In 1993, petitioner hired Aegis Security to provide security for Foxcatcher Farm. After Aegis security consultant Patrick Goodale told du Pont that he was vulnerable to terrorist attacks and kidnappings, du Pont installed razor wire in the gaps between the walls of his home to ensure that potential attackers could not crawl between them. He became convinced that there was an extensive network of tunnels under the estate through which attackers could enter his home, and he therefore ordered his property to be excavated. When excavation failed to reveal the tunnel network, Aegis did nothing to allay du Pont's fears, but instead began surveying the property with sonar. And du Pont eventually came to believe that there were mechanical trees on his property that could extend their branches into the house and remove items by passing them from branch to branch.

Petitioner's paranoid delusions intensified in the fall of 1995. He became convinced that an October 1995 fire in the estate's greenhouse was an attempt on his life. The next month, after sustaining a head injury in an accidental fall, he claimed that he had been assaulted by a Russian soldier. In a November 24, 1995 police interview about that incident, du Pont claimed to be the Dalai Lama, the head of the Buddhist church, and the "supreme leader," and he asserted that unless the police arrested his assailant, "the entire Russian army would be in Newtown Township [where he lived] fighting the ultimate war."

In December 1995, petitioner traveled to Bulgaria in connection with his work for FILA. While there, he was examined and treated for a stomach ailment and bronchitis by a physician assigned to the Bulgarian wrestling team. That doctor prescribed a medication containing N-butyl scopolamine—a compound now known to induce delirium and cause visual hallucinations—and instructed du Pont to take the drug at least three times a day. In early January, while the Bulgarian wrestling team was visiting Foxcatcher

Farm, petitioner was examined by another of the team's doctors who instructed du Pont to continue taking the medication—and to double the dose.

Petitioner's pre-existing paranoia intensified under the influence of N-butyl scopolamine. After a January 1996 blizzard, he instructed staff not to plow the estate's roads so that he could see the footprints of anyone trying to come after him. And with increasing frequency, petitioner told almost anyone who would listen—an outside painting contractor, estate staff, wrestlers on Team Foxcatcher—that his life was in jeopardy and that Foxcatcher Farm had been threatened.

On the afternoon of January 26, 1996, du Pont went to survey storm damage around the estate. He was accompanied by Goodale, and both men were armed. Petitioner eventually headed to the home of David Schultz, an Olympic champion wrestler who was living and training at Foxcatcher Farm. Schultz was outside fixing his car radio when du Pont arrived. Without any apparent provocation, du Pont shot Schultz three times; Schultz died on the scene.

Petitioner returned to his home, and a two-day standoff with the police ensued. During that stand-off, police negotiators communicated with him using a dedicated phone line. Approximately twenty-four hours into the standoff, police began taping their negotiations; those tapes recorded du Pont asking to speak with his attorney more than 100 times and repeatedly refusing to answer any questions about the circumstances surrounding the shooting. Police eventually cut the heat to du Pont's mansion, and when du Pont emerged to investigate, police arrested him.

B. Procedural History

Prosecutors charged du Pont with Schultz's murder. In September 1996, however, he was declared incompetent to stand trial and was transferred to Norristown State Hospital for aggressive treatment with anti-psychotic medication.

Though his competency was ultimately restored, he would remain medicated at Norristown throughout his trial.

1. Petitioner pleaded not guilty by reason of insanity. Expert witnesses for the prosecution testified that although du Pont was mentally ill, he was not legally insane at the time he shot Schultz. Those experts relied heavily upon recordings that the prosecutors had introduced in their case-in-chief containing police recordings made during petitioner's standoff with the police. They argued that his pre-arrest refusal to talk about the shooting and his repeated requests for an attorney demonstrated that he knew that shooting Schultz was wrong and, thus, that he was not legally insane at the time he acted. Trial counsel objected to the introduction of the tapes for such purposes, and in the alternative requested a curative jury instruction. The trial judge overruled counsel's objection and deferred any ruling on counsel's alternative request for a limiting instruction. The judge's eventual jury charge contained no such instruction, yet when given a clear opportunity to raise the issue, trial counsel inexplicably failed to renew his prior objection to the use of du Pont's pre-arrest silence and requests for counsel in order to establish his guilt.

After seven days of deliberations, the jury rejected petitioner's insanity defense and returned a verdict of "guilty but mentally ill."[2] The trial court sentenced him to serve 13-to-30 years in prison. du Pont appealed his conviction to the

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[2] Pennsylvania law recognizes two mental illness verdicts: one for "a class of defendants who have committed a crime and are adjudged guilty of the crime but mentally ill, and [one for] a class of individuals who have committed a crime but are exculpated as a result of insanity." *Pennsylvania v. Trill*, 543 A.2d 1106, 1122 (Pa. Super. Ct. 1988). Although members of both groups are considered mentally deficient, "the former [are] treated and punished for their conduct, and the latter [are] treated but not incarcerated." *Id.* at 1123.

Superior Court of Pennsylvania, but his appellate counsel failed to pursue the prosecution's use of du Pont's pre-arrest silence despite the fact that at least four federal courts of appeal and state courts in no fewer than six jurisdictions had—prior to du Pont's trial—squarely held that the federal Constitution prohibits States from relying on a defendant's pre-arrest silence in order to establish his guilt. *See, e.g., United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1566-68 (1st Cir. 1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *United States v. Caro*, 637 F.2d 869, 874-75 (2d Cir. 1981); *Washington v. Easter*, 922 P.2d 1285, 1290 (Wash. 1996); *Nebraska v. Rowland*, 452 N.W.2d 758, 762-63 (Neb. 1990); *Wisconsin v. Fencl*, 325 N.W.2d 703, 711 (Wisc. 1982); *Utah v. Palmer*, 860 P.2d 339, 349 (Utah. Ct. App. 1993); *New Jersey v. Marshall*, 617 A.2d 302, 305 (N.J. Sup. Ct. App. Div. 1992); *Minnesota v. Dunkel*, 466 N.W.2d 425, 428 (Minn. Ct. App. 1991). The Superior Court affirmed du Pont's conviction and sentence, and du Pont's petition for discretionary review in the Supreme Court of Pennsylvania was denied.

2. du Pont then filed a petition for post-conviction relief under Pennsylvania's Post-Conviction Relief Act. Among other issues, the petition alleged that both his trial and appellate counsel had been ineffective for failing to pursue the prosecution's use of his pre-arrest silence in order to establish his guilt. The trial court rejected each of du Pont's claims. Though it acknowledged that Pennsylvania courts had subsequently recognized that a defendant's pre-arrest silence is inadmissible to establish the defendant's guilt, App. 61a-62a (citing *inter alia Commonwealth v. DiNicola*, 797 A.2d 966 (Pa. Super. Ct. 2002) *rev'd*, 866 A.2d 329 (Pa. 2005) (en banc), the trial court purported to distinguish those cases "on the ground that they addressed whether evidence of pre-arrest silence is admissible to demonstrate consciousness of guilt as opposed to the defendant's sanity." App. 64a

(citing *Nebraska v. Harms*, 643 N.W.2d 359 (Neb. 2002)). The trial court made no effort to explain why that distinction is constitutionally relevant.

Though it refused to conduct an evidentiary hearing on counsel's reasons for declining to follow through on his earlier objection to the jury consideration of du Pont's pre-arrest silence as evidence of guilt, the trial court then sought to excuse that failure on the ground that Pennsylvania courts did not squarely recognize the federal constitutional prohibition against using a defendant's pre-arrest silence as substantive evidence of guilt until 2000—three years after du Pont's conviction. App. 65a. The court, however, did not account for the fact that counsel had identified the issue prior to the jury charge, or that courts in at least ten jurisdictions had previously rejected the admissibility of a defendant's pre-arrest silence for such purposes. And it failed to propose any basis for excusing appellate counsel's failure to pursue this issue despite the existence of ample federal and state authority supporting the claim.

Finally, as an alternative ground for decision, the trial court held that petitioner could not demonstrate any prejudice from the jury's consideration of the pre-arrest audiotapes because du Pont's psychiatrists also referred to du Pont's silence about the shooting—during interviews they conducted with du Pont long *after* he was arrested and charged with Schultz's murder. App. 65a-67a.

du Pont's petition also argued that trial and appellate counsel had been ineffective for failing to investigate or present any evidence concerning the impact that petitioner's ingestion of scopolamine may have had in causing or exacerbating his mental condition. The trial court held, however, that counsel was not ineffective for failing to present an involuntary intoxication defense based upon the scopolamine, because such a defense had not been recognized under Pennsylvania law. App. 49a-58a.

3. The Superior Court of Pennsylvania affirmed the denial of post-conviction relief. *See* App. 2a-24a. With respect to the pre-arrest silence, the appellate court expressly conceded that the prosecution's use of the audiotapes "appears legitimately to implicate the concerns du Pont expresses," App. 14a—namely, that the jury might have relied on du Pont's "cold responses to an accusation that he had just shot and killed someone" in order to conclude "that he was solely a bad individual in refutation of his insanity defense." App. 13a (internal quotations omitted).

Nonetheless, the court refused to hold that du Pont's trial or appellate counsel had been ineffective, reasoning instead that counsel's failure to pursue the issue adequately at trial or on appeal was non-prejudicial because—of all things—the content of those tapes was *irrelevant* to the legal inquiry at du Pont's trial: which was whether he knew "*at the time of the shooting* ... 'that what he was doing was wrong,'" App. 14a (emphasis in original) (quoting 18 Pa. Cons. Stat. § 315(b)), not whether he had realized as much by the time the police started recording his requests for counsel and his invocation of his right to remain silent some twenty-four hours later. *Id.* The court then held that, in any event, the "calculated behavior" evinced on the audiotapes was not "*more damning*" than the fact that du Pont had fled the scene and refused to turn himself over the police. App. 15a (emphasis added).

With respect to counsel's failure to investigate or present evidence of scopolamine, the appellate court affirmed for the reasons stated by the trial court. The court recognized that "no appellate decision under Pennsylvania law has affirmatively acknowledged the existence of such a defense," and therefore, it concluded that a reasonable counsel would not have presented such a defense. App. 18a.

The Supreme Court of Pennsylvania denied petitioner's time petition for review. App. 1a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE WELL-DEVELOPED CONFLICT OVER WHETHER PRE-ARREST SILENCE MAY BE INTRODUCED AS SUBSTANTIVE EVIDENCE OF GUILT.

This case presents the Court with the chance to resolve an open and notorious conflict among state and federal courts over whether the Fifth Amendment permits the introduction of a criminal defendant's pre-arrest silence as evidence of that defendant's guilt.[3] Twenty-five years ago, this Court expressly reserved judgment on whether the Fifth Amendment permits the introduction of a criminal defendant's pre-arrest silence as substantive evidence of that defendant's guilt, *see Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980) ("Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment."). Since that decision, dozens of state and federal courts have opined on the matter and reached conflicting results. *See* Wayne R. LaFave et al., 3 Criminal Procedure § 9.6 (2d ed. 2005) ("The Supreme Court has not passed on use of such [pre-arrest] silence as substantive evidence of guilt in the prosecution's case-in-

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[3] The constitutional concerns inherent in prosecutorial reliance on a defendant's pre-arrest "silence" encompass a defendant's demand to speak with his or her attorney in response to police questioning; as this Court long has explained, "silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13 (1986); *see also Combs v. Coyle*, 205 F.3d 269, 279 (6th Cir. 2000) ("Although Combs's statement referred not to silence but to his right to an attorney, the admissibility of the statement is properly analyzed as a comment on prearrest silence.").

chief, a matter as to which there is a split of authority in the lower courts.").[4]

The overwhelming majority of jurisdictions has answered that question with a resounding no: Permitting the State to rely upon a defendant's pre-arrest silence as evidence that he was aware of his wrongdoing would turn the Fifth Amendment's fundamental privilege against self-incrimination into a dead letter. *See infra* Section I.B. Doing so would ensure that no matter how a criminal suspect responded to official accusations of criminal conduct, that response—to remain silent or speak up—would produce incriminating evidence admissible at trial.

A. The lower court's decision condones that Hobson's choice. From the very outset of the proceedings, prosecutors honed in on petitioner's pretrial silence and requests for counsel to prove his guilty mindset in the wake of Schultz's death. Thus, the Commonwealth's lead prosecutor told the jury in his opening statement that petitioner "sought his

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[4] Academic commentators also have recognized the existence of the split and called out for this Court's review. *See, e.g.*, Aaron R. Pettit, Comment, *Should the Prosecution be Allowed to Comment on a Defendant's Pre-Arrest Silence in its Case-in-Chief?*, 29 Loy. U. Chi. L. J. 181, 221 (1997) ("Since the use of the defendant's pre-arrest silence in the prosecution's case-in-chief to imply guilt violates the defendant's constitutional rights, and because several circuits are split on the issue, the Supreme Court should grant certiorari and resolve the confusion.... This issue demands uniform treatment among all federal and state courts."); Kory A. Jackson, Case Note, *The Right to Remain Silent: The Use of Pre-Arrest Silence in United States v. Oplinger, 150 F.3d 1061 (5th Cir. 1998)*, 68 U. Cin. L. Rev. 505, 527-28 (2000) ("Whether a court should admit pre-arrest silence in the face of governmental interrogation is an issue that has been lingering in the Federal judicial system for some time.... Because allowing pre-arrest silence in the face of governmental interrogations is clearly impermissible under the Fifth Amendment, the Supreme Court should grant certiorari to resolve the dispute between the Circuit Courts.")

lawyer, over one hundred times, either by name or by reference" during the stand-off, and the prosecutor informed the jury that during the trial it would hear the actual tapes of those demands. N.T. 67.

Prosecution experts relied on the tapes to prove that petitioner had a guilty conscience. N.T. 2309-10 (opinion of Dr. O'Brien) ("It's relevant that an individual who has engaged in criminal behavior first tries to reach their attorney after that behavior, and in my opinion that is behavior indicative of an awareness of wrongdoing."); N.T. 2732-33 (opinion of Dr. Dietz) ("Immediately upon returning home, du Pont attempted to contact his attorney, Mr. Wochok, and continued to try to reach him after that point, showing that he knew that he was in trouble, which indicates to me a consistent pattern of his knowing that what he had done was wrong.... du Pont refused to answer any questions about the shooting and he referred all questions about the shooting to his lawyer, indicating that he knew he'd done something wrong.").

And the lead prosecutor used petitioner's pre-arrest silence to cinch his closing argument:

> The telephone conversation tapes begin and the Defendant asks for, as you heard, his lawyer 106 times. And the fact that he's asking for his lawyer, does that reflect, well, does the reflect he's out of touch with reality? Or the fact that he wants a lawyer to deal with a problem he has and that he thinks his wealth, his influence, his power and his lawyer are going to do what they've done before?

N.T. 3090. He even displayed a chart titled "Wrongfulness" during those remarks, citing du Pont's silence and requests for counsel as direct evidence of his knowledge that what he had done was wrong, N.T. 3075, 3089-93, and, thus, that

petitioner was "guilty but mentally ill," 18 Pa. Cons. Stat. § 314, rather than "not guilty by reason of insanity." 18 Pa. Cons .Stat. § 315.

It is beyond serious dispute that competent counsel would have fully pursued the prosecution's reliance on du Pont's pre-arrest silence at trial and on direct appeal; indeed, the court below acknowledged as much. App. 13a (holding that du Pont's claim of ineffectiveness has "arguable merit").

B. In the more than twenty-five years since this Court in *Jenkins* expressly reserved judgment on the question, 447 U.S. at 236 n.2, literally dozens of courts have opined on the matter. A majority of jurisdictions—including the First, Second, Sixth, Seventh, and Tenth Circuits, and state courts in Colorado, Ohio, Minnesota, Nebraska, New Jersey, Utah, Washington, and Wisconsin—has squarely held that the Fifth Amendment prohibits the prosecution's substantive use of a defendant's pre-arrest silence in seeking to prove the defendant's guilt. *See, e.g., Ouska v. Cahill- Masching*, 246 F.3d 1036, 1047 (7th Cir. 2001); *Combs v. Coyle*, 205 F.3d 269, 282-83 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1566-68 (1st Cir. 1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *United States v. Caro*, 637 F.2d 869, 874-75 (2d Cir. 1981); *Ohio v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004); *Washington v. Easter*, 922 P.2d 1285, 1290 (Wash. 1996); *Nebraska v. Rowland*, 452 N.W.2d 758, 762-63 (Neb. 1990); *Wisconsin v. Fencl*, 325 N.W.2d 703, 711 (Wisc. 1982); *Colorado v. Welsh*, 58 P.3d 1065, 1070-71 (Colo. Ct. App. 2002), *aff'd on other grounds*, 80 P.3d 296 (Colo. 2003); *Utah v. Palmer*, 860 P.2d 339, 349 (Utah. Ct. App. 1993); *New Jersey v. Marshall*, 617 A.2d 302, 305 (N.J. Super. Ct.

App. Div. 1992); *Minnesota v. Dunkel*, 466 N.W.2d 425, 428 (Minn. Ct. App. 1991).[5]

Beyond the courts' uniform agreement that permitting the prosecution to comment upon a defendant's pre-arrest silence "would eviscerate the privilege," *Combs*, 205 F.3d at 284 n.9, by placing the defendant in a "veritable Catch-22," *Fencl*, 325 N.W.2d at 711, these courts have offered at least four basic rationales for precluding the admission of such evidence. First, permitting the prosecution to comment on a defendant's pre-arrest silence at trial would effectively compel suspects to speak—and thereby incriminate themselves—when first confronted by the police. *See, e.g., Jenkins*, 447 U.S. at 250 n.4 (Marshall, J., dissenting); *Welsh*, 58 P.3d at 1071 ("If pre-arrest silence were admissible for substantive purposes, a defendant could not avoid the introduction of past silence by refusing to testify. Thus, a defendant would be under pressure to waive the privilege against self-incrimination ... upon first contact with police."); *Easter*, 922 P.2d at 1290 ("When the State may later comment [that] an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A bell once rung cannot be unrung.") (internal quotation omitted).

Second, admitting pre-arrest silence would pressure defendants to take the stand at trial in order to explain their prior silence. *See, e.g., Combs*, 205 F.3d at 285 ("Because in the case of substantive use a defendant cannot avoid the introduction of his past silence by refusing to testify, the defendant is under substantial pressure to waive the privilege

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[5] This Court has rejected any distinction between the use of post-arrest silence to demonstrate a defendant's guilt and to overcome a defendant's plea of insanity, *Wainwright*, 474 U.S. at 293-95, and there is no basis for drawing any such distinction in the pre-arrest context. *See, e.g., Welsh*, 58 P.3d at 1071.

against self-incrimination ... later at trial in order to explain the prior silence."); *Leach*, 807 N.E.2d at 341 ("Use of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence.").

Third, permitting prosecutorial comment on a defendant's pre-arrest silence would "encourage the authorities to refrain from issuing *Miranda* warnings as long as possible in an attempt to generate either inferential evidence of guilt from silence or an admission prior to custodial interrogation." *Palmer*, 860 P.2d at 349; *see also Easter*, 922 P.2d at 1290 ("The State's theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant's pre-arrest silence as evidence of guilt.").

And finally, allowing the use of such evidence simply fails to yield any probative information. As the Sixth Circuit has explained:

> Just as "every post-arrest silence is insolubly ambiguous," *Doyle v. Ohio*, 426 U.S. 610, 617 (1976), there are many reasons why a defendant may remain silent before arrest, such as a knowledge of his *Miranda* rights or a fear that his story may not be believed. The probative value of such silence is therefore minimal. Furthermore, the use of prearrest silence may even subvert the truthfinding process; because it pressures the defendant to explain himself or to suffer a court-sanctioned inference of guilt, the likelihood of perjury is increased.

Combs, 205 F.3d at 285; *see also Colorado v. Welsh*, 80 P.3d 296, 307 (Colo. 2003).

Nonetheless, a minority of jurisdictions, including the Fifth, Eighth, Ninth, and Eleventh Circuits and state courts in California, Connecticut, Iowa, Michigan, Missouri, and Texas, have brushed aside these concerns in holding that the prosecution's reliance on a defendant's pre-arrest silence does not violate the Fifth Amendment's basic privilege against self-incrimination. *United States v. Campbell*, 223 F.3d 1286, 1290 (11th Cir. 2000) (per curiam); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *Vick v. Lockhart*, 952 F.2d 999, 1002-03 (8th Cir. 1991); *Missouri v. Kinder*, 942 S.W.2d 313, 326 (Mo. 1996); *Connecticut v. Leecan*, 504 A.2d 480, 484 (Conn. 1986); *Iowa v. Habhab*, 695 N.W.2d 504 (Iowa Ct. App. 2005); *California v. Nesbitt*, No. B141286, 2001 WL 1584377, at *11 (Cal. Ct. App. Dec. 12, 2001); *Michigan v. Schollaert*, 486 N.W.2d 312, 316 (Mich. Ct. App. 1992); *Waldo v. Texas*, 746 S.W.2d 750, 755 (Tex. Ct. Crim. App. 1988).

For its part, the court below expressly recognized there was "arguable merit" to du Pont's claim that counsel was ineffective for failing to pursue the prosecution's use of the audiotapes and corresponding reliance on du Pont's pre-arrest silence. App. 13a-14a. Indeed, it acknowledged that the prosecution's use of that evidence "appears legitimately to implicate the concerns du Pont expresses," App. 14a—namely, that the jury might have relied on du Pont's cautious and "cold responses to an accusation that he had just shot and killed someone" in order to conclude "that he was solely a bad individual in refutation of his insanity defense." App. 13a (internal quotations omitted).

C. Nonetheless, the court below went on not only to reject du Pont's claim of ineffective assistance, but to deny him an evidentiary hearing on the matter. App. 16a-17a. To support that bizarre result, the court reasoned that du Pont could not show any *prejudice* from the prosecutor's reliance on the audiotapes of his pre-arrest silence *because* those

tapes were *irrelevant* to the prosecution's claim that du Pont knew he was acting wrongfully at the moment he committed the crime—even though the prosecution itself had relied on those tapes to prove precisely that point. App. 14a-15a (explaining that the legal inquiry at du Pont's trial was whether du Pont knew "*at the time of the commission* of the offense ... that what he was doing was wrong," 18 Pa. Cons. Stat. § 315(b) (emphasis added), not whether he had realized as much by the time the police started recording him some twenty-four hours later). And it supplemented that questionable basis for minimizing the prejudicial impact of the recordings by claiming that, in any event, the "calculated behavior" evinced on those tapes was not "*more damning*" than the fact that "[i]n the moments and hours following the shooting, du Pont hastened from the scene of the crime to his home" and then refused "to submit himself to police custody ... in the two days that followed." App. 15a. (emphasis added).

That reasoning is specious. No court has ever absolved the admission of prejudicial evidence on the ground that such evidence was non-probative, and thus should never have been admitted into evidence in the first instance. And no court has ever held that prejudice for Sixth Amendment ineffectiveness purposes is limited to situations where the otherwise excludable evidence is "*more damning*" than other properly introduced evidence. To the contrary, this Court has repeatedly emphasized that the relevant inquiry is merely whether there is "a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Indeed, in *Williams v. Taylor*, this Court singled out what the court below did in this case as the paradigmatic example of a state court decision that would be "contrary to ... clearly established precedent" for purposes of review under 28 U.S.C. § 2254(d)(1):

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different."

529 U.S. 362, 405-06 (2000) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)) (alterations in original).

The *Strickland* standard is easily satisfied here. As noted above, the prosecution made petitioner's pre-arrest silence the centerpiece of its opening and closing statements, and its expert psychiatric witnesses commented extensively on this silence to support their assertions that petitioner demonstrated an awareness of his wrongdoing. Despite the prosecution's best efforts, the jury was plainly torn between concluding that petitioner was "not guilty by reason of insanity" and "guilty but mentally ill" under Pennsylvania's tripartite sentencing scheme: It took seven full days to conclude that du Pont was merely mentally ill. Excluding the highly prejudicial evidence of petitioner's pre-arrest silence unquestionably raises "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

Accordingly, the *only* genuine question under *Strickland*'s prejudice analysis is whether, as the majority of jurisdictions have concluded, petitioner's pre-arrest silence should have been excluded from trial. If, as a minority of jurisdictions have asserted, the prosecution appropriately

commented on du Pont's pre-arrest silence, then trial counsel's failure to pursue this issue fully at trial and then on direct appeal could make no difference to this case. Twenty-five years after this Court reserved the question in *Jenkins*, and with the benefit of an open, notorious, and mature division of authority among both state and federal courts, the time has come for this Court to finally resolve whether the Fifth Amendment permits the introduction of a defendant's pre-arrest silence as evidence of that defendant's guilt.

II. THE DECISION BELOW DEPARTS FROM ESTABLISHED PRINCIPLES OF DUE PROCESS BY HOLDING THAT PENNSYLVANIA LAW DOES NOT RECOGNIZE THE DEFENSE OF INVOLUNTARY INTOXICATION.

The decision below warrants review for another reason: the Pennsylvania Superior Court justified trial counsel's failure to present an additional line of defense—that of involuntary intoxication—on a ground that places the Commonwealth's law in conflict with every other jurisdiction and with "fundamental principle[s] (plurality op.) of justice." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). Although the Pennsylvania appellate court resolved the issue in the context of petitioner's Sixth Amendment right to counsel, the court's decision turned on its holding that Pennsylvania, alone among the United States, does not recognize an involuntary intoxication defense that is well-established in the framework of Anglo-American law.

In this case, the undisputed facts provided petitioner with a defense of involuntary intoxication that complemented his insanity defense. Less than two months before the killing, petitioner took ill while traveling in Bulgaria, and a doctor affiliated with the Bulgarian wrestling team prescribed him a medication containing N-butyl scopolamine, a compound known to induce delirium and visual hallucinations. Several weeks later, another Bulgarian doctor instructed petitioner to double the dose. There thus was ample evidence that the

drug exacerbated petitioner's existing mental state, and led to the violent events just weeks later. Trial counsel, however, never investigated or presented at trial any evidence concerning this medication.

This Court has held that the Sixth Amendment, as incorporated by the Fourteenth Amendment, guarantees criminal defendants the right to the "effective assistance of counsel." *See e.g., Wiggins* at 539 U.S. 520. This Court has repeatedly recognized that the right imposes upon counsel the duty to investigate potential avenues of defense and to present those arguments that serve the defendant's interests. *Strickland* 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). Where counsel chooses not to investigate or present an argument, the court looks at whether counsel's failure to do so constituted a reasonable strategic judgment.

In this case, petitioner's counsel was aware that petitioner had begun taking scopolamine in the weeks preceding the killing. Yet trial counsel never investigated the use of the drug or presented any evidence at trial to support the argument that petitioner's use of the drug had caused or exacerbated his mental condition, and therefore, he was not guilty of murder.

The Pennsylvania courts did not dispute that trial counsel failed to investigate or present this evidence of involuntary intoxication. Nor did they challenge the evidentiary basis for the defense. Rather, because trial counsel must present all available defenses, or provide a strategic justification for not doing so, the courts held that trial counsel could not have been ineffective, because "no appellate decision under Pennsylvania law has affirmatively acknowledged the existence of such a defense." App. 18a. Thus, because this defense was not recognized by Pennsylvania law, the lower court held that competent counsel had no duty to present it.

But the defense of involuntary intoxication was well-established at the common law, and has been recognized by more than 40 States throughout the country. *See infra* pp. 22-23. Although before this case, the Pennsylvania appellate courts have not had occasion to reach the issue, criminal defendants in Pennsylvania have raised the defense in numerous cases.[6] Therefore, it cannot be reasonably disputed that competent trial counsel would have been aware of the defense and would have had nothing to lose by presenting this evidence in petitioner's defense at trial.

Trial counsel in this case, however, did not present the defense of involuntary intoxication, and therefore, the Pennsylvania courts' decision rested unavoidably on the proposition that the defense of involuntary intoxication does not exist under Pennsylvania law. That holding makes Pennsylvania the only jurisdiction in the country to provide that an individual may be punished for acts committed while in a drug-induced state of insanity, where the petitioner consumed the drugs through no fault of his own. And that holding violates the "fundamental principle[s] of justice," that this Court has recognized to provide limits upon the

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[6] *See Pennsylvania v. Smith*, 831 A.2d 636, 637-38 (Pa. Super. Ct. 2003) (defendant raises involuntary intoxication defense); *Pennsylvania v. Collins*, 810 A.2d 698, 700 (Pa. Super. Ct. 2002); *Pennsylvania v. Griscom*, 600 A.2d 996, 997 (Pa. Super. Ct. 1991); *Pennsylvania v. Plank*, 478 A.2d 872, 875-76 (1984). A trial court in Pennsylvania in fact has held that the involuntary intoxication defense exists. *See Pennsylvania v. Butterfield*, 17 D. & C. 3d 62, 65-66 (Pa. Ct. Common Pleas 1980) (recognizing existence of involuntary intoxication defense). Other authorities have observed that defendants have raised the defense, but that no Pennsylvania appellate court has ruled on it. *Pennsylvania v. Kuhn*, 475 A.2d 103, 109-12 (Pa. 1984) (Montemuro, J., concurring) (recognizing that the issue was open under Pennsylvania law); Committee Note, Pa. Standard Jury Instructions (Crim.) 8.308(c) ("the existence and scope of the defense of involuntary intoxication is not yet fully established in Pennsylvania law").

otherwise broad discretion the States have in proscribing standards of justice. *Egelhoff*, 518 U.S. at 43 (plurality op.).

This Court has held that the Due Process Clause imposes a substantive limit upon the State's ability to impose criminal punishment. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 563 (2003); *Egelhoff*, 518 U.S. at 43; *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). The criminal law may not deprive criminal defendants of those guarantees that are "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson*, 432 U.S. at 202 (citation omitted). And in this regard, the Court has long recognized that fundamental principles of due process prohibit the State from imposing criminal punishment on an individual absent proof that he has undertaken some volitional act. *See Robinson v. California*, 370 U.S. 660 (1962).

In *Montana v. Egelhoff*, Justice Scalia, writing for a plurality of the Court, articulated a framework for determining whether widely embraced protections under the criminal law had become so established in our nation's constitutional framework so as to constitute a "fundamental principle" protected by the Fourteenth Amendment. *Egelhoff*, 518 U.S. at 43. In *Egelhoff*, the plurality opinion emphasized that the "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Id.*

In that case, the Court addressed whether a defendant had the right to present evidence of voluntary intoxication so as to mount a defense to the specific intent required for first-degree murder. In rejecting such a claim, this Court emphasized that the *voluntary* intoxication defense lacked deep roots in historical practice. *See id.* at 44. The plurality opinion relied, in particular, upon the nineteenth-century commentator, Matthew Hale, who had stated without reservation that voluntary intoxication was not a recognized defense to criminal liability at common law. *See id.*

This case presents the mirror image of that claim: for while the common law did not recognize a "voluntary intoxication" defense, *involuntary* intoxication has always been recognized to provide the defendant with the same immunity from liability that the law affords the insane. *See* Wayne R. LaFave & Austin W. Scott, *Criminal Law* 394 (2d ed. 1986). Indeed, in the late eighteenth century, prior to the adoption of the Constitution, Matthew Hale expressly recognized the availability of the involuntary intoxication defense:

> That if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as aconitum or nux vomica, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him.

1 Hale, *History of Pleas of the Crown* 32 (1778). Early American courts followed this common-law tradition to recognize the defense of involuntary intoxication throughout the nineteenth century. *See, e.g., Roberts v. Michigan*, 19 Mich. 401, 1870 WL 2246, at *5-6 (1870) ("where the defendant is made drunk by stratagem—the fraud of another, or the unskillfulness of his physician—then he is not responsible"); *New York v. Robinson*, 2 Parker Crim. 235 (N.Y. Sup. Ct. 1855); *Pearson's Case*, 168 Eng. Rep. 1108 (N.P. 1835) ("If a party be made drunk by stratagem, or the fraud of another, he is not responsible."). Therefore, this common law rule was deeply rooted in the fabric of the laws of our nation at the time of the ratification of the Fourteenth Amendment. *See Egelhoff*, 518 U.S. at 47.

American courts have continued to recognize the involuntary intoxication defense. *See e.g., Colorado v. Garcia*, 113 P.3d 775, 780 (Colo. 2005); *Utah v. Gardner*, 870 P.2d 900, 902 (Utah 1993); *Evans v. Alaska*, 645 P.2d

155, 159 (Alaska 1982); *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 855 (Minn. 1976); *Saldiveri v. Maryland*, 143 A.2d 70, 77 (Md. 1958); *Illinois v. Penman*, 110 N.E. 894, 900 (Ill. 1915); *North Carolina v. Rippy*, 10 S.E. 259, 261 (N.C. 1889); *Arizona v. Davis*, 10 P. 359 (Ariz. 1886); *Iowa v. Sopher*, 30 N.W. 917 (1886).

The defense has further been recognized by the drafters of the Model Penal Code as well as in the criminal codes of a number of states. *See e.g.*, 11 Del. Code Ann. § 423; 720 Ill. Comp. Stat. Ann. § 5/6-3; Mo. Ann. Stat. § 562.076(1); Model Penal Code § 2.08(4). And the defense has been recognized by the courts of almost 40 states. *See also* Phillip E. Hassman, *When intoxication deemed involuntary so as to constitute a defense to criminal charge*, 73 A.L.R.3d 195 (2005) (citing cases).

As it applies here, numerous courts have held that the defense of involuntary intoxication is available where the side effects of medication prescribed by a doctor rendered the defendant legally insane. *See e.g.*, *Arizona v. McKeon*, 38 P.3d 1236, 1240 (Ariz. Ct. App. 2002); *Massachusetts v. Darch*, 767 N.E.2d 1096, 1098 (Mass. App. Ct. 2002); *Mendenhall v. Texas*, 15 S.W.3d 560, 565-66 (Tex. Ct. App. 2000); *Wisconsin v. Gardner*, 601 N.W.2d 670, 674 (Wis. Ct. App. 1999); *Brancaccio v. Florida*, 698 So. 2d 597, 600 (Fla. Dist. Ct. App. 1997); *Boswell v. Florida*, 610 So. 2d 670, 673 (Fla. Dist. Ct. App. 1992); *Michigan v. Caulley*, 494 N.W.2d 853, 859 (Mich. Ct. App. 1992); *Colorado v. Turner*, 680 P.2d 1290, 1293 (Colo. Ct. App. 1983); *Shurbet v. Texas*, 652 S.W.2d 425, 428 (Tex. Ct. App. 1982); *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 858 (Minn. 1976); *Washington v. Gilcrist*, 552 P.2d 690, 692 (Wash. Ct. App. 1976). Against the weight of this authority, petitioner is aware of no other court to have held that a criminal defendant who becomes intoxicated, through no fault of his own, should be held liable for actions committed under such medically induced delusions.

The Pennsylvania courts' conclusion that the laws of the Commonwealth would not have permitted petitioner to present an involuntary intoxication defense represents a radical departure from this firmly established and "fundamental" constitutional principle. An individual may not be punished under the criminal laws without proof that he has voluntarily acted in contravention of the State's laws. *Robinson*, 370 U.S. 660. In this case, petitioner could have presented evidence that would have demonstrated that he shot the victim while under delusions caused by, or exacerbated, by a prescription medicine. The Pennsylvania courts' conclusion that the jury could not have considered such evidence as a defense to conviction violates longstanding and fundamental principles of justice. The petition for certiorari should be granted on this issue of fundamental importance, and the decision below reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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March 9, 2006

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Supreme Court of Pennsylvania

Commonwealth
v.
John E. duPont
NO. 1130 MAL (2004)

October 25, 2005

Pa.Super., 860 A.2d 525

Appeal from the Superior Court.

Disposition: Denied.

Superior Court of Pennsylvania

COMMONWEALTH of Pennsylvania, Appellee
v.
John E. duPONT, Appellant.
Submitted May 17, 2004.
Filed Sept. 17, 2004.
Reargument Denied Nov. 19, 2004.

Before: BENDER, BOWES, and JOHNSON, JJ.

JOHNSON, J.:

¶ 1 John E. duPont appeals the trial court's denial without a hearing of his Post Conviction Relief Act (PCRA) petition challenging, *inter alia*, the effectiveness of his trial and appellate counsel. We agree with the trial court that duPont's PCRA contentions did not require a hearing. Consequently, we affirm.

¶ 2 This Court, and now the trial court in its thorough opinion denying duPont's PCRA petition without a hearing pursuant to Pa.R.Crim.P. 907, Trial Court Opinion, 9/22/03 (T.C.O.), at 2-10, have provided extensive accounts of the facts and circumstances surrounding duPont's killing of David Schultz on January 26, 1996, and duPont's refusal to surrender to police for days following the killing. Rather than reconstitute prior accounts, we rely principally on the account this Court provided in its opinion affirming duPont's judgment of sentence. *See Commonwealth v. duPont*, 730 A.2d 970 (Pa. Super. 1999).

¶ 2 Prior to his arrest in January 1996, appellant resided on an 800-acre estate known as "Foxcatcher Farm" located in Delaware County. For many years appellant operated a wrestling training facility on the premises, and provided housing on the estate to some of the wrestlers who trained at

his facility and were members of "Team Foxcatcher," a wrestling team founded by appellant.

¶ 3 People who knew appellant noticed a change in his behavior and emotional state around the time of his mother's death in 1988. Appellant became extremely security conscious, and hired a security firm in 1993 to provide protection on the estate. Despite the firm's efforts implementing extensive security measures, appellant exhibited paranoid fear on several occasions that he was being spied upon and that his life was in danger. Several witnesses also related incidents of appellant's drug and alcohol abuse between 1988 and 1995. In spite of his unusual behavior, however, appellant continued to manage his facility and maintain the daily operations.

¶ 4 Over time appellant developed close relationships with some of the wrestlers at his facility, and came to dislike others. He began to exhibit animosity toward David Schultz, a successful wrestler and also one of the facility's wrestling coaches, sometime in 1995. On the afternoon of January 26, 1996, appellant went to the residence of Mr. Schultz accompanied by one of the estate security consultants, Patrick Goodale. Mr. Schultz was working on his car, but greeted appellant on his arrival. Appellant asked Mr. Schultz, "You got a problem with me?" and shot him three times with a .44 Magnum revolver. He also pointed the weapon at Mr. Goodale and toward Mr. Schultz' wife who was in the house. Appellant then fled in his vehicle to his mansion, reloaded and locked up his weapon, and refused to surrender to police. During the two day standoff which followed, appellant spoke with his attorney on numerous occasions. He was finally apprehended on January 28, 1996 when he left the mansion to attempt a repair of the heating system.

¶ 5 On February 9, 1996 the trial court ordered a competency examination, which was completed on September 9, 1996. Following a hearing on appellant's competency, the trial court determined appellant to be incompetent to proceed to trial by order of September 24, 1996. He was remanded to the Norristown State Hospital for treatment. A second competency hearing was held in December 1996, and the trial court determined that appellant was then competent to proceed to trial, which began in January 1997.

¶ 6 At trial, appellant did not dispute that he shot Mr. Schultz, but put forth a defense of insanity. Following the guilty but mentally ill verdicts, he was sentenced on May 13, 1997 to a term of imprisonment of thirteen to thirty years on the murder conviction and a concurrent term of three to six months on the assault conviction; an order for costs was also imposed.

Id. at 973-74 (footnotes omitted).

¶ 3 Following our affirmance of his judgment of sentence, duPont sought review in the Supreme Court of Pennsylvania, which denied his petition. On June 12, 2000, the United States Supreme Court denied his petition for writ of *certiorari*. On March 22, 2001, duPont filed his timely petition seeking relief under the PCRA, 42 Pa. C.S. § § 9541-46. The trial court entered a notice of intent to dismiss that petition without a hearing, pursuant to Pa. R. Crim. P. 907. In response, duPont sought and was granted leave to amend his PCRA petition, which he filed on December 2, 2002. On August 4, 2003, the trial court again signaled its intent to dismiss the petition without a hearing, which it did by opinion and order dated September 22, 2003. DuPont appeals this order.

¶ 4 Generally stated, our standard of review regarding an order denying a petition under the PCRA requires us to determine whether the record supports the PCRA court's determination and whether the court correctly stated and applied the law. *See Commonwealth v. Allen*, 557 Pa. 135, 732 A.2d 582, 586 (1999). We will not disturb the PCRA court's findings unless those findings are unsupported by the record. *See Commonwealth v. Carr*, 768 A.2d 1164, 1166 (Pa. Super. 2001).

¶ 5 DuPont seeks a hearing rather than an outright ruling on the merits, which comports with our approach to such a case. *See, e.g., Commonwealth v. Ford*, 335 Pa. Super. 398, 484 A.2d 406 (1984). Thus, we must consider at the outset the standard against which we measure a dismissal of a PCRA petition without a hearing. Pennsylvania Rule of Criminal Procedure 907 provides as follows:

Rule 907. Disposition Without Hearing

¶ 6 Except as provided in Rule 909 for death penalty cases,

(1) the judge shall promptly review the [PCRA] petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief,***530** and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

* * * *

(4) When the petition is dismissed without a hearing, the judge shall issue an order to that effect and shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time within which the appeal must be taken.

Accordingly, a PCRA court may decline to hold a hearing on the petition if petitioner's claim is patently frivolous or lacks support from either the record or other evidence. *See Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001). "A reviewing court on appeal must examine each of the issues raised ... in light of the record to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and denying relief without an evidentiary hearing." *Id.*

¶ 7 Given the prolixity of duPont's statement of issues raised on appeal, rather than state them all at once, we begin by quoting only duPont's first question, which asserts numerous bases for relief on the basis of ineffective assistance of trial and appellate counsel. His second and third questions will be quoted later, when we take them up.

I. Did the Lower Court err in denying Mr. duPont's PCRA petition without a hearing on trial counsels' and appellate counsels' ineffectiveness regarding (1) Trial counsels' failure to adequately request a jury instruction on Mr. duPont's pre-arrest exercise of his right to remain silent and appellate counsels' abandoning the issue that: (a) this evidence should not have been admitted in the Commonwealth's case in chief; (b) trial counsel was ineffective for failure to request a jury instruction on Mr. duPont's right to silence; or (c) if trial counsel preserved the jury instruction issue, in abandoning that issue on appeal. (2) Trial counsel failed to present character evidence and

appellate counsel failed to raise trial counsel's ineffectiveness. (3) Trial and appellate counsel failed to adequately investigate the case and fully develop evidence that Mr. duPont took prescribed medication that resulted in psychosis; (4) Trial counsel failed to adequately investigate the role of Patrick Goodale and Aegis Security in the shooting and) of Dr. John O'Brien's involvement in the prosecution. (5) Appellate counsel failed to raise trial counsel's ineffectiveness with regard to the medication issue, the Goodale issue and the O'Brien issue as noted above and, in addition, appellate counsel was ineffective in failing to [word omitted] that a mistrial should have been granted due to the Commonwealth's misrepresentations that it would present direct evidence and witnesses, including Paul McCarthy, of Mr. duPont's use of cocaine.

Brief for Appellant at 4 (italicization and errors of grammar and typography in original). We pause to note that, in sum, duPont effectively disregards Pa. R.A.P. 2116, which requires that an appellant's Statement of Questions Involved "should not ordinarily exceed 15 lines [and] must never exceed one page." Although duPont's Rule 2116 statement just manages to fit on a single page, the spirit of the rule is violated in that the questions plainly are set in italicized type of smaller size, with narrower line spacing and margins than the rest of the brief. In any case, the lion's share of duPont's prodigious brief is dedicated to the above allegations that trial counsel were serially ineffective, and that direct appellate counsel also were ineffective for failing to raise trial counsels' serial ineffectiveness. Brief for Appellant at 13-60.

¶ 8 Our Supreme Court often has emphasized an appellant's weighty burden in establishing ineffectiveness of counsel under these circumstances, referred to in the discussion that follows as the "*Pierce* test."

When a petitioner alleges trial counsel's ineffectiveness in a PCRA petition, he must prove by a preponderance of the evidence that his conviction or sentence resulted from ineffective assistance of counsel "which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S. § 9543(a)(2)(ii). We have interpreted this provision in the PCRA to mean that the petitioner must show: (1) that his claim of counsel's ineffectiveness has merit; (2) that counsel had no reasonable strategic basis for his action or inaction; and (3) that the error of counsel prejudiced the petitioner-i.e., that there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. *See Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 333 (1999). We presume that counsel is effective, and it is the burden of Appellant to show otherwise.

Commonwealth v. Stevens, 559 Pa. 171, 739 A.2d 507, 512 (1999); *see Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (2001); *Commonwealth v. Legg*, 551 Pa. 437, 711 A.2d 430, 432-33 (1998). Under the law applicable at the time of duPont's post-conviction challenge, where a challenge to the effectiveness of counsel first occurs in the context of a PCRA petition, the petitioner must assert "layered ineffectiveness" of counsel-in effect, that not only was trial counsel ineffective in some material way at trial, but that appellate counsel *also* was ineffective, according to the above three-pronged analysis, in failing to raise on direct appeal some alleged instance of trial counsel's ineffectiveness. *See generally Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014, 1021-23 (2003) (describing what the PCRA requires appellants to plead and prove to establish "layered ineffectiveness" of counsel).

¶ 9 In *McGill*, the Supreme Court constructed an elaborate hypothetical involving a post-conviction petitioner's

allegation of ineffectiveness involving trial counsel's (Counsel 1) failure to object to a problematic jury instruction, and appellate counsel's (Counsel 2) failure to raise on direct appeal Counsel 1's failure to object to that instruction. The Court summarized its discussion and holding as follows:

> [F]or a petitioner to properly raise and prevail on a layered ineffectiveness claim, sufficient to warrant relief if meritorious, he must **plead, present,** and **prove** the ineffectiveness of Counsel 2 (appellate counsel), which ... necessarily reaches back to the actions of Counsel 1 (trial counsel). To preserve (plead and present) a claim that Counsel 2 was ineffective in our hypothetical situation, the petitioner must (1) **plead**, in his PCRA petition, that Counsel 2 was ineffective for failing to allege that Counsel 1 was ineffective for not objecting to the erroneous jury instruction, *see Commonwealth v. Marrero*, 561 Pa. 100, 748 A.2d 202, 203, n. 1 (2000); and (2) **present** argument on, i.e., develop, each prong of the *Pierce* test as to Counsel 2's representation, in his brief or other court memoranda. Then, and only then, has the petitioner preserved a layered claim of ineffectiveness for the court to review; then, and only then, can the court proceed to determine whether the petitioner has proved his layered claim.

McGill, 832 A.2d at 1022 (emphasis in original). In a more recent case, our Supreme Court reaffirmed a strict reading of *McGill*. *See Commonwealth v. Lopez*, 578 Pa. 545, 854 A.2d 465, 2004 WL 1632646 (2004). The Court in *Lopez* explained that all three prongs of the *Pierce* test must be pleaded and proved as to trial counsel by a PCRA petitioner

simply to establish that the layered ineffectiveness allegation regarding trial counsel satisfies the arguable merit prong of *Pierce* as to appellate counsel. *See Lopez*, 854 A.2d 465, 2004 WL 1632646, *2. Assuming the PCRA petitioner carries this burden, he then must plead and argue the second and third *Pierce* prongs as to appellate counsel. *See id.* The implication, of course, is that even where petitioner has a colorable claim of trial counsel ineffectiveness, that is not in itself sufficient to prove appellate counsel's ineffectiveness; appellate counsel nevertheless may have had a reasonable basis for declining to pursue the ineffectiveness claim on appeal, or alternatively, appellate counsel's failure to do so might not have prejudiced petitioner to an extent warranting relief. *Cf. Commonwealth v. Lambert*, 568 Pa. 346, 797 A.2d 232, 244 (2001) ("Claims involving appellate counsel ineffectiveness, moreover, involve concerns unique to appellate practice. Arguably meritorious claims may be omitted in favor of pursuing claims which, in the exercise of appellate counsel's objectively reasonable professional judgment, offer a greater prospect of securing relief.")

¶ 10 In the discussion that follows, we address duPont's ineffective assistance of counsel (IAC) contentions in the order in which he argues them. We have examined in detail the pleading requirements for raising IAC on PCRA review because we find that duPont's brief generally fails to satisfy the *McGill* standard reaffirmed by *Lopez*. Nevertheless, while duPont fails to lead with robustly developed IAC claims against direct appellate counsel, as *Lopez* requires, we construe his arguments as though he has done so for purposes of analysis and review, because we find all of duPont's arguments regarding trial counsel ineffectiveness insufficient to establish *Pierce's* arguable merit prong as to appellate counsel's effectiveness. Consequently, no detailed discussion by duPont as to the basis for appellate counsel's decision not to pursue the allegations of IAC at trial or regarding prejudice on appeal arising from appellate

counsel's decision will be required. *See Lopez*, 854 A.2d 465, 2004 WL 1632646, *2 (refusing to remand to enable petitioner to amend pleadings where petitioner fails to plead and prove all three *Pierce* factors as to trial counsel, because petitioner, having thus failed to demonstrate arguable merit as to appellate counsel's conduct, cannot prevail on his layered IAC claim); *cf. Lambert*, 797 A.2d at 243 n. 9 ("[A] court is not required to analyze the elements of an ineffectiveness claim in any particular order of priority; instead, if a claim fails under any necessary element ..., the court may proceed to that element first.").

¶ 11 First, duPont alleges IAC in appellate counsel's failure to argue trial counsel's ineffectiveness for failing to request a jury instruction limiting consideration of the prosecution's audiotape evidence of duPont's conversations with police during the stand-off. Brief for Appellant at 17-31. At trial, the jury heard evidence that, after mortally wounding Schultz, duPont returned to his mansion, reloaded and stowed the murder weapon, and instructed his staff not to admit the police onto the property. T.C.O. at 5. Soon thereafter, the police surrounded duPont's estate, and a siege lasting approximately two days ensued. Due to adverse weather, duPont's land-based phone lines were not functioning at the time. The police, however, established a direct phone connection to enable negotiators to communicate with duPont. These conversations, portions of which were taped, featured repeated requests by duPont to speak with counsel and reflected his general unwillingness to discuss the shooting with police. The prosecution sought to introduce these audiotapes during its case-in-chief to preemptively rebut duPont's insanity defense. DuPont's trial counsel objected to their introduction, and immediately requested in the alternative a curative jury instruction directing the jury not to consider the audiotapes as substantive evidence of guilt. The trial court, the Honorable Patricia H. Jenkins, overruled the objection, and belayed her

decision whether to charge the jury according to trial counsel's request. Ultimately, however, her jury charge did not feature anything responsive to trial counsel's request. Trial counsel, however, failed to object to the jury charge when given the opportunity. Notes of Testimony, 2/18/97, at 3154 (R. 384a).

¶ 12 Judge Jenkins observed that this presented a novel question of Pennsylvania law. She denied duPont's challenge, however, because she found, by reference to the jurisprudence of other jurisdictions, that rebuttal of an insanity defense constituted a proper purpose for the admission of such evidence. Accordingly, she concluded that the contention lacked arguable merit as to trial counsel. T.C.O. at 29-32. Judge Jenkins alternatively found that trial counsel acted reasonably in not objecting to the jury charge, and that duPont had not been so prejudiced by the evidence as to warrant a favorable IAC ruling. T.C.O. at 33-34.

¶ 13 Although Judge Jenkins, in her responses to several of duPont's IAC allegations, refers to the "reasonable basis" prong under *Pierce*, T.C.O. at 24-28, 33, 36, 38, we will neither examine nor rely on these findings. Our courts repeatedly have held or implied that an attorney's basis for making one strategic or tactical decision over another, whether at trial or on appeal, is not subject to judicial speculation. The reasonableness of an attorney's strategic or tactical decisionmaking is a matter that we usually consider only where evidence has been taken on that point, *see Commonwealth v. DiNicola*, 751 A.2d 197, 202 (Pa. Super. 2000); *cf. McGill*, 832 A.2d at 1025 (requiring a hearing as to the adequacy of trial counsel's investigatory efforts on behalf of defendant), which Judge Jenkins' Rule 907 denial of duPont's petition without a hearing precluded. That said, we do not find this error reversible, because failure to satisfy the other *Pierce* prongs is fatal to duPont's arguments, *see Lambert*, 797 A.2d at 243 n. 9.

¶ 14 DuPont's first allegation of IAC may have arguable merit. Furthermore, Judge Jenkins' findings as to counsel's reasonable basis for declining to pursue this claim are inconclusive given the absence of an evidentiary hearing examining counsels' bases for acting as they did. We decide neither of these questions, however, because we find that duPont fails to demonstrate prejudice arising from these actions.

¶ 15 DuPont argues, in his effort to establish prejudice for failure to provide the requested jury instruction, that his

> requests for his attorney during the standoff, and his refusal to discuss the case with authorities during this time, were very cold responses to an accusation that he had just shot and killed someone. Under the facts of this case, the jury was certainly free to use this evidence to establish that he was solely a "bad" individual in refutation of his insanity defense.

Brief for Appellant at 31. Judge Jenkins, in her response to this argument, noted that duPont's "own witnesses constantly referred to petitioner's insistence on remaining silent about the shooting." T.C.O., 9/22/03, at 33-34 (citing numerous excerpts of testimony from duPont's battery of expert witnesses in which the experts noted duPont's refusal to discuss the killing). Judge Jenkins found that "any prejudice resulting from references to petitioner's pre-arrest silence and requests to speak with counsel was eradicated by numerous defense references to petitioner's silence ...." T.C.O. at 34 (citing *Commonwealth v. Simmons*, 541 Pa. 211, 662 A.2d 621, 633 (1995) and *Commonwealth v. Ghur*, 327 Pa. Super. 18, 474 A.2d 1151, 1155 (1984) for the proposition that prejudice will not be found where the evidence improperly admitted is cumulative of other properly admitted evidence).

¶ 16 We agree that the evidence in question was cumulative of properly admitted evidence to a degree sufficient to overwhelm any claim of prejudice, but not of that evidence Judge Jenkins emphasized. The question of duPont's conduct during the stand-off immediately following the shooting, in particular his insistence on not discussing the killing and on speaking to his attorney, appears legitimately to implicate the concerns duPont expresses. His silence in the months and years following the killing, as to which his expert witnesses testified and on which Judge Jenkins evidently relied, would not clearly alter the prejudice to duPont of a jury learning of his failure to protest his innocence or otherwise behave as though he was mentally ill in support of his defense strategy at trial. That strategy sought to convince the jury that duPont was legally insane at the time of the killing, not in the months that followed.

¶ 17 Rather than focusing on the ostensibly cumulative evidence found in duPont's experts' considerable testimony on this point, however, we look to another circumstance. The idea of prejudice we are concerned with in this case, and one evidently novel to Pennsylvania courts, is whether the evidence admitted was prejudicial to the success of duPont's asserted insanity defense. Accordingly, we must consider whether duPont's silence and requests for counsel during the stand-off constituted material, prejudicial evidence of his knowledge *at the time of the shooting* that killing David Schultz was wrong. *See* 18 Pa. C.S. § 315(b) (requiring, to establish a defense of insanity, that "at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong."). In considering this question, we must recall that the police did not begin recording their conversations with duPont until noon on the day after the shooting, at which time duPont's conduct might

be less probative of his mental state at the time of the shooting.

¶ 18 Even if our answers to the above question fail to obviate the harm of the lack of instruction, we still must consider whether such evidence was evidence of sanity such as might undermine his defense, and, if so, whether its introduction without a curative instruction was any more damning than the undisputedly admissible evidence of duPont's conduct immediately following the shooting. In the moments and hours following the shooting, duPont hastened from the scene of the crime to his home, where he reloaded and stored the murder weapon. We also must consider whether the audiotape evidence was more damning than the evidence of duPont's refusal to submit himself to police custody immediately after the shooting.

¶ 19 In light of this cumulative evidence of calculated behavior in the wake of the shooting, duPont's argument as to prejudice fails to indicate what singular characteristic of the audiotapes in question constituted evidence sufficiently prejudicial to cast into doubt the legitimacy of the jury's verdict, even absent a limiting jury instruction. *See Stevens*, 739 A.2d at 512 (noting that prejudice exists where petitioner shows a "reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different."). We find the audiotape evidence introduced at trial to be cumulative, in effect, of the properly admitted evidence of duPont's behavior immediately following the shooting and in the two days that followed. DuPont having failed to satisfy his burden of establishing prejudice deriving from the alleged ineffective assistance of trial counsel, he cannot satisfy *Pierce's* arguable merit prong as to appellate counsel. Consequently, his assertion of IAC on this theory fails.

¶ 20 Next, duPont argues IAC in appellate counsel's failure to raise trial counsel's refusal to discover and submit testimony of duPont's reputation in his community for peacefulness and non-violence. Brief for Appellant at 31-38. We will grant *arguendo* that duPont had four witnesses who were ready, able, and willing to testify to duPont's reputation in the community for peacefulness and law-abiding behavior around the time of the shooting, and that affidavits to this effect were submitted in conjunction with duPont's amended PCRA petition. The trial court was not so generous, and denied the relief duPont requested on two bases-first, that had trial counsel introduced such evidence, the door would have opened to the prosecution's cross-examination of those character witnesses as to numerous examples of inappropriate and illegal conduct by duPont in the years prior to the shooting. T.C.O. at 37. Second, Judge Jenkins briefly noted that the boilerplate affidavits in which duPont's putative character witnesses asserted the nature of their offered testimony failed to satisfy the governing standard-*i.e.*, by failing specifically to indicate that they "agreed to testify that [duPont] enjoyed a reputation for peacefulness and law abiding behavior." T.C.O. at 37 n. 25. Thus, the trial court saw no need to grant a PCRA hearing on the contribution these witnesses might have made at trial had trial counsel chosen to have them testify. The trial court also noted the irrelevance of *Commonwealth v. Morgan*, 559 Pa. 248, 739 A.2d 1033 (1999), which held that the prosecution cannot cross-examine character witnesses as to instances of criminal conduct for which the defendant was not convicted. T.C.O. at 37. Because this decision post-dated duPont's conviction, the law available to defense counsel at the time of trial did not preclude such cross-examination.

¶ 21 Once again, we are faced with a question as to which Judge Jenkins speculated about trial and appellate counsels' decision-making bases without the benefit of an evidentiary hearing. We have expressed our reservations about this

aspect of her ruling. Nonetheless, in order to compel a hearing duPont must demonstrate prejudice arising from trial counsels' action or omission, as well as prejudice arising from appellate counsels' failure to raise this issue on appeal. *See Commonwealth v. Ervin*, 766 A.2d 859, 865-66 (Pa. Super. 2000), *appeal denied*, 568 Pa. 627, 793 A.2d 904, *cert. denied*, 536 U.S. 939 (2002). DuPont again fails to carry his burden.

¶ 22 DuPont makes much of the distinction between the not guilty by reason of insanity verdict he sought and the guilty but mentally ill verdict he received, noting the jury instruction that the former connotes that the defendant is "sick rather than bad," but that the latter requires the jury's finding that the defendant is both "bad and sick." Brief for Appellant at 35. Thus, in light of the extensive evidence of his bad character, duPont argues that it was "imperative that counsel challenge" these attempts to label duPont a "bad" person. Brief for Appellant at 35 (noting evidence admitted including, *inter alia*, that defendant struck a pedestrian with his car and fled the scene, excluded African-Americans from the Foxcatcher wrestling team, drove at great speed in the presence of children, and collected Nazi memorabilia). He cites no authority in support of this proposition, although generally he adverts to authority emphasizing the importance of good character evidence.

¶ 23 Based on the boilerplate affidavits tendered to the trial court, we fail to see how the generic testimony as to duPont's reputation in his community at the time of the shooting-especially in light of the fact that two of the four witnesses in question hail from Florida and Texas, respectively-so plainly would have undermined the jury's verdict that a remand is required. Indeed, we find, to the contrary, that the extensive and specific evidence of duPont's "bad" conduct makes it likely that no prejudice whatsoever occurred from trial counsel's failure to pursue these witnesses' testimony, and in

any event not so much as to satisfy the strict standard that governs our determination of prejudice on post-conviction review. We also note the inadequacy of duPont's assertions regarding appellate counsel's failure to pursue this issue; that "there was room in his direct appeal brief," Brief for Appellant at 37, does not bear on our assessment of appellate counsel's conduct, except insofar as it demonstrates that prior appellate counsel did not see fit to use up every page allowed by the Appellate Rules. Having failed to demonstrate prejudice arising from counsel's failure to call character witnesses, duPont has failed to demonstrate the necessity of an evidentiary hearing as to this claim.

¶ 24 DuPont next alleges IAC due to counsel's failure to discover and investigate the possibility that, at the time of the shooting, duPont was under the influence of "a mind-altering medication that had been lawfully prescribed to him by [Bulgarian] medical doctors," and thus could have pursued a defense of involuntary intoxication. Brief for Appellant at 38-44. He argues that there was sufficient evidence available to trial counsel to warrant exploration of the chemical composition and effect of the Bulgarian pharmaceuticals, because he admitted to his doctors prior to trial that he had been taking those drugs prior to the killing. He also maintains that involuntary intoxication is an affirmative defense under Pennsylvania law. Judge Jenkins observed that no appellate decision under Pennsylvania law has affirmatively acknowledged the existence of such a defense, thus duPont could not demonstrate arguable merit under *Pierce*. T.C.O. at 20-28. Judge Jenkins also observed that had trial counsel failed to assert an insanity defense under the circumstances of this case, trial counsel would have been even more exposed to allegations of ineffective assistance. T.C.O. at 27-28. Because our review of Judge Jenkins' treatment of this issue reveals no error, and because we agree with her conclusions, we reject this challenge on the sound basis of her discussion.

¶ 25 Next, duPont alleges IAC in direct appellate counsel's failure to raise issues of prosecutorial misconduct arising from the Commonwealth's failure to produce a promised witness. Brief for Appellant at 44-51. He claims that the prosecution employed a "bait-and-switch" tactic to bootstrap admission of evidence concerning duPont's alleged cocaine habit, which was prejudicial insofar as it did not bear on duPont's insanity defense. Judge Jenkins ruled that no prejudice occurred as a consequence of her rulings (and curative jury instructions where necessary), and noted in support of her ruling that duPont himself introduced substantial evidence of cocaine use. Given the clarity of Judge Jenkins' comments on this point, as well as the utter lack of authority offered in support of duPont's claim that a hearing is required on this issue, *see* Pa. R.A.P. 2119 (requiring citation to authority in support of appellant's argument), we are content to adopt Judge Jenkins' sound analysis of this issue as our own.

¶ 26 DuPont next asserts IAC in counsel's failure to investigate "the role and the complicity of Patrick Goodale and his company, Aegis Security, in the shooting," Brief for Appellant at 51, which pertains to the possible manslaughter defense duPont alleges might have been asserted at trial. Brief for Appellant at 51-57. Once again, however, aside from cases setting forth the undisputed duty defense counsel has to investigate as fully as possible the various defense theories available, Brief for Appellant at 51 (citing *Davis v. Alabama*, 596 F.2d 1214, 1217-18 (5th Cir. 1979); *Commonwealth v. Bailey*, 480 Pa. 329, 390 A.2d 166 (1978)), duPont fails to argue from binding authority the particular failure of trial counsel in this case that, had it been avoided, would probably have led the jury to a different result than it reached. As the trial court observed, "that trial counsel failed to win an acquittal hardly means his performance was ineffective." T.C.O. at 38 (citing *Commonwealth v. Howard*, 749 A.2d 941, 955 (Pa. Super.

2000), *appeal denied*, 564 Pa. 726, 766 A.2d 1244 (2001)). Judge Jenkins found "no reason to believe that a manslaughter defense would have changed the outcome of trial," and indeed characterized this particular theory-either that duPont's animus towards Goodale, or Goodale's own putative but unsubstantiated enmity towards Schultz as conveyed to duPont, somehow prompted the killing-as "outlandish." T.C.O. at 38. We agree with Judge Jenkins, and note as well that here duPont's failure to develop the *Pierce* elements as to appellate counsel's decision not to pursue this course further precludes relief. It is not at all clear that appellate counsel would have acted unwisely in favoring other arguments on appeal than this one.

¶ 27 In his last IAC argument, DuPont contends that trial counsel did not sufficiently investigate misconduct or bias pertaining to the prosecution's expert witness, John S. O'Brien, M.D., J.D. Brief for Appellant at 57-60. Once again his argument contains only a boilerplate assertion of prejudice and fails to refer even once to Pennsylvania precedent in support of his allegations. Moreover, the trial court rejected this claim as previously litigated and decided by this Court. T.C.O. at 39 (citing *duPont*, 730 A.2d at 975-77, 980-81). In light of duPont's failure properly and persuasively to brief this issue, we adopt Judge Jenkins' treatment of this issue as our own. Thus, we reject all of duPont's assertions of ineffective assistance of counsel.

¶ 28 DuPont raises two other issues, for which he argues more briefly.

> *II. Did the Lower Court err in denying Mr. duPont's PCRA petition without a hearing on recently discovered evidence that the Commonwealth violated Mr. duPont's Due Process rights by (1) failing to disclose that Robert Calabrese had repeatedly denied that*

> *he had witnessed Mr. duPont ingest cocaine and (2) coercing him into testifying to the contrary.*
>
> *III. Did federal due process violations flaw Mr. duPont's sentencing requiring a re-sentencing.*

Brief for Appellant at 4.

¶ 29 With his "second" question, duPont contends that the Commonwealth violated the *Brady* rule, *see Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to provide duPont with evidence in its possession suggesting that Robert Calabrese was coerced into testifying to duPont's alleged drug use. Absent Calabrese's testimony that he had observed duPont use cocaine, duPont argues, the remaining circumstantial evidence of cocaine use "would not have carried much weight with the jury." Brief for Appellant at 65. In response to this allegation, Judge Jenkins moved directly to the question, required by the PCRA, whether the withheld evidence that is allegedly exculpatory "would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S. § 9543(a)(2)(vi). As to this requirement, in effect, duPont's entire argument boils down to this conjecture: in virtue of this evidence (and this evidence only), "in the eyes of the jury, Mr. duPont was now branded as a drug abuser and someone whose mental instability was self induced. Instead of being a blameless victim of mental illness, he was now a cocaine addict whose misfortunes were his own fault." Brief for Appellant at 66.

¶ 30 The trial court focused on duPont's failure to demonstrate prejudice, noting in particular that the defense initiated discussion of duPont's drug use, T.C.O. at 15, that Calabrese's recanted testimony established only that duPont had used cocaine approximately eight years before the

killing, T.C.O. at 13, and that several experts and other wrestlers had testified extensively and cumulatively to duPont's cocaine use, T.C.O. at 15-17. The trial court concluded that,

[i]n view of this vast body of evidence, it is difficult to envisage how exclusion of Calabrese's testimony would have changed the verdict.... Calabrese's testimony was a relatively minor piece of evidence in rebutting the defense claim that [duPont] killed Dave Schultz because he suffered from paranoid schizophrenia. The absence of Calabrese's direct testimony, contained in only three pages of transcript, would not have devastated the Commonwealth's case; it would have had virtually no impact.

T.C.O. at 17-18 (internal quotation marks and citations omitted). We agree with this statement and the balance of Judge Jenkins' analysis on this question. T.C.O. at 12-20. Accordingly, we affirm on the rationale there asserted.

¶ 31 Finally, with his "third" question, duPont asserts a due process violation in the fact that his sentence, which was in part predicated on his own experts' unanimous diagnosis that he suffered from paranoid schizophrenia, was constitutionally improper because his disorder was misdiagnosed. Brief for Appellant at 68-69. He contends that, as a matter of fact, based on new expert affidavits, he was suffering from toxic psychosis caused by his Bulgarian medication. Judge Jenkins found this contention cognizable under the PCRA, *see* 42 Pa. C.S. § 9543(a)(1), insofar as it asserts a constitutional violation during sentencing, but then found it to be waived under § 9543(a)(3), because petitioner failed to raise the claim during sentencing. T.C.O. at 42. She further notes that, while this might fall within duPont's arguments regarding counsel's ineffectiveness, duPont chose not to pursue this angle, instead arguing that the evidence of the toxic effect of scopolamine was newly discovered under

the PCRA. T.C.O. at 42 n. 28. Thus, she found that duPont "simply has no excuse for waiting until the PCRA stage before injecting the issue of scopolamine into this case." T.C.O. at 42.

¶ 32 DuPont provides no explanation as to why we should rule otherwise than the trial court. Nor does he refute Judge Jenkins' alternative rejection of duPont's claim that his (ostensibly erroneous) diagnosis was the "central assumption" of the trial court during sentencing, wherein Judge Jenkins emphasized that the central assumption was that "petitioner committed a terrible crime for which he deserved a lengthy period of incarceration. Although the Court considered the fact that petitioner was mentally ill and needed treatment, the specific cause of his mental illness was not material to the Court's sentencing determination." T.C.O. at 43. Once again, we find Judge Jenkins' thorough treatment of this issue-viewed on this last point through the prism of her rejection of the involuntary intoxication defense duPont would assert, T.C.O. at 20-28-more than adequate to the task of supporting her dismissal of duPont's PCRA petition without a hearing pursuant to Pa. R. Crim. P. 907. We therefore adopt her reasoning as to this question.

¶ 33 Our Opinion has addressed each point raised in duPont's Statement of the Questions Involved. Brief for Appellant at 4. We find waived any questions not expressly raised in that Statement pursuant to Pa. R.A.P. 2116(a) ("[O]rdinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby.").

¶ 34 For all the foregoing reasons, we find no cause to grant duPont relief from the trial court's denial of his PCRA petition without a hearing. Accordingly, we affirm the trial court's order effecting that result.

¶ 35 Order **AFFIRMED.**

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. 26-96
v.	:	
JOHN E. duPONT	:	

William R. Toal, III, Attorney for the Commonwealth of Pennsylvania.

Michael J. Malloy, Esquire, Attorney for John E. duPont.

OPINION

JENKINS, P. FILED: 9/22/03

Before the Court is John duPont's amended petition for relief under the Post Conviction Relief Act[1] ("Amended PCRA Petition") requesting that the Court vacate his judgment of sentence and grant him a new trial or, in the alternative, a new sentencing hearing.

The prodigious number of claims in this petition brings to mind Judge Aldisert's admonition in *United States v. Hart*, 693 F.2d 286, 287, n. 1 (3d Cir. 1982):

> With a decade and a half of federal appellate court experience behind me, I can say that

[1] 42 Pa.C.S.A. §§ 9541-9546, Act of Apr. 13, 1988, P.L. 1988-47.

> even when we reverse a trial court it is rare that a brief successfully demonstrates that the trial court committed more than one or two errors. I have said in open court that when I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that it is an irrebuttable presumption, but it is a presumption that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness.

[Emphasis added]. Petitioner has failed to rebut the presumption. None of his claims have merit. The Court will deny the Amended PCRA Petition.

FACTUAL AND PROCEDURAL HISTORY

On February 25, 1997, a jury found petitioner guilty but mentally ill of the third-degree murder of Olympic wrestler and gold medal winner David Schultz and the simple assault of Patrick Goodale, an eyewitness to the murder.

Petitioner resided on an 800-acre estate known as "Foxcatcher Farm" ("Foxcatcher Farm" or "the estate") located in Delaware County. A wrestling enthusiast, petitioner founded a wrestling team known as "Team Foxcatcher" and operated a wrestling training facility at the estate. He also provided housing on the estate to some of the wrestlers on Team Foxcatcher.

People who know petitioner notice a change in his behavior and emotional state around the time of his mother's death in 1988. Petitioner became extremely security conscious and hired a security firm in 1993 to provide protection on the estate. Despite the firm's efforts

implementing extensive security measures, petitioner exhibited paranoid fear on several occasions that he was being spied upon and that his life was in danger. During 1993, he installed razor wire in the walls of his home to prevent persons from hiding within the walls, and he had excavators dig on his property to search for underground tunnels he believed led into his home, N.T. 1998-99[2]. Several witnesses also related incidents of petitioner's drug and alcohol abuser between 1988 and 1995. N.T. 2007, 2015, 2047, 2049-50, 2069-70. In spite of his unusual behavior, however, petitioner continued to manage his facility and maintain the daily operations.

Over time, petitioner developed close relationships with some of the wrestlers at his facility and came to dislike others. He began to exhibit animosity toward David Schultz, a successful wrestler and wrestling coach who had lived with his family at Foxcatcher since 1989. Petitioner was jealous of Schultz's professional success as well as Schultz's close friendship with Valentine Jordanov, a Bulgarian Olympic wrestling champion who also lived at Foxcatcher. In 1995, petitioner refused to make Schultz the team coach, even though he was universally acclaimed as a gifted coach and the leader of the wrestlers at Foxcatcher. N.T. 2743-46. Instead, he gave the job to Jordanov despite Jordanov's very poor English. Petitioner believed that Schultz was interfering with his relationship with Jordanov and attempting to wrest control of the entire team. N.T. 1939-50, 2676-78. He fired Schultz but then relented when Jordanov and another of his favorite wrestlers, Rob Calabrese, threatened to leave. N.T. 1924-30, 2743.

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[2] All references to "N.T." that are not followed by a date refer to the trial transcript.

During the fall of 1995, petitioner was angry with Schultz because of Schultz's support for his close friend and fellow wrestler, Dan Chaid, whom petitioner believed was responsible for two fires at Foxcatcher. N.T. 2127-28, 2140, 2157, 2747. Petitioner evicted Chaid from the estate at the point of a machine gun, N.T. 2088, 2635, and became enraged after the eviction when Schultz allowed Chaid to store his van at Schultz's home on the estate. N.T. 108-11, 2749. Petitioner became even angrier when he began to suspect that Schultz and Chaid informed the top wrestling officials about his erratic behavior. N.T. 2398, 2453-54, 2749-53. Lastly, petitioner was furious because of an incident in November 1995 when petitioner had gone to Schultz's house, highly intoxicated, with a rifle, demanding to know where Schultz had hidden Chaid. Schultz and his wife, Nancy, gave petitioner some coffee and tried to calm him. As petitioner left, he fell, hit his head and cut his face, Schultz drove petitioner home, but petitioner became incensed when Schultz, for petitioner's own protection, removed the bullets from his rifle. The next day, petitioner told police that Chaid had hit him with a bat. N.T. 280, 636-39, 2754. Schultz, however, related the actual cause of petitioner's injury to police. N.T. 634. Petitioner obtained a copy of the police report and discovered that Schultz had directly contradicted his story about the injury. N.T. 112-15, 644, 2180-81, 2186.

Also in the fall of 1995, petitioner informed Schultz that he, unlike the other wrestlers, could not go to the Olympic training camp. N.T. 118, 1797, 2756. Then, breaking two longstanding traditions, petitioner refused to join the Schultzes for Thanksgiving dinner, N.T. 106, 2753-56, and rescinded his invitation to the Schultz family to attend Christmas dinner at his mansion.

In the winter of 1995-96, petitioner often sped his car past Schultz's house, ignoring Nancy Schultz's pleas about

the danger to the couple's children. N.T. 2637. Petitioner instructed his staff not to plow Schultz's driveway or permit Schultz to use the snowplow. N.T. 106. One week before his death, Schultz received a message to call petitioner's attorney, a call which usually meant that petitioner was evicting a wrestler and his family from the estate. N.T. 106-07, 2756.

Petitioner was an expert marksman with his own firing range and an arsenal of sophisticated weapons. N.T. 256. On January 26, 1996, Jordanov's birthday, petitioner told his security consultant, Goodale, that he wanted to drive around and look at storm damage. Although petitioner usually carried a .38 caliber gun, on this day, he selected his powerful .44 Magnum revolver, loaded with particularly lethal hollow-pointed bullets. N.T. 284-85, 2726-28.

Petitioner drove directly to Schultz's house, where he found Schultz fixing his car radio. Schultz got out of his car, smiled, waved, and said: "Hi, coach." Petitioner first pointed the gun at Goodale and then turned to Shoot Schultz. Goodale screamed: "John, what are you doing?" and scrambled to get out of the car. The first bullet tore into Schultz's chest. N.T. 285-87.

Petitioner said to Schultz: "You got a problem with me?" N.T. 289. He shot Schultz again and Schultz fell face down in the snow. Hearing the shots and her husband's scream, Nancy Schultz ran to the front porch and cried out for petitioner to stop. Petitioner turned the gun on her, forcing her to retreat to the doorway. As she looked on in horror, petitioner aimed the gun at her husband's motionless body and fired a third shot into her husband's back. N.T. 121-22. All three of the hollow-pointed bullets caused devastating injuries. Petitioner shot Schultz in the heart, both lungs, elbow, upper arm, diaphragm, esophagus, intestines and stomach. N.T. 605-14, 620.

Nancy Schultz called 911 and screamed at petitioner that the police were coming. He pointed the gun at her again. He also pointed his gun again at Goodale, who had removed his own gun from his holster. The barrel of Goodale's gun met petitioner's gun while Goodale exited the vehicle. Petitioner threw his gun on the car seat while Goodale crouched and slammed the door. At that point, petitioner threw his car into reverse and sped away. N.T. 122-23, 286-87, 297.

Nancy Schultz ran to her husband and found that he was still alive. She cradled his head on her lap, said "David, it's going to be okay," and told him that she loved him. His eyes were open, but he could not speak. She held him and waited for the ambulance, but he died in her arms just as they arrived. N.T. 122-23.

Petitioner fled to his forty-four room mansion and ordered his staff not to admit the police. N.T. 256, 1069, 2529. He called his long-time attorney, Taras Wochok, at least six times during the next hour. N.T. 311-19, 1070, 1856. He also reloaded the murder weapon and locked it in his library.

Petitioner held law enforcement officers at bay for two days. To apprehend him peacefully, the police organized a regional SWAT team from nearly two dozen municipalities. Through nearly 48 hours of extreme cold, high winds, and freezing rain, the police guarded the mansion to prevent petitioner from escaping and harming anyone else. N.T. 12/3/96, pp. 13-15.

A special team of trained negotiators handled all communications with petitioner to seek his peaceful surrender. N.T. 671. Although the mansion had lost traditional phone service because of storm damage, the negotiators restored a dedicated phone line which petitioner

could use to speak only with the police. N.T. 308, 461; N.T., 12/31/96, pp. 20-21. Petitioner used his cell phone to call his attorney and Jordanov repeatedly. N.T. 311-15. The day after the shooting, the police began taping their conversations[3] with petitioner on the dedicated phone line. N.T. 460-62; N.T., 12/31/96, p. 73.

During the standoff, petitioner asked for his attorney over 100 times and threatened to use his weapons. N.T. 320-25, 1071, 1167, 1858. Petitioner was permitted to talk to his attorney, who urged him to surrender. Petitioner never did. Finally, two days after the shooting, with the heat in the mansion turned off, petitioner became so cold that he asked to come outside to fix it. When the police confronted him, he tried to escape by running back into the mansion. The police tackled him from behind. He was carrying his Bulgarian passport which had his picture with a Bulgarian name, Jordanov Dimitrov. N.T. 485-93, 1914.

The police found over a dozen weapons in petitioner's library, bedroom, and bathroom, including an 9 millimeter pistol, shotgun, semi-automatic assault rifles, a Striker "streetsweeper" shotgun with a revolving chamber, and the murder weapon. Several of the guns were loaded. The search also revealed large quantities of additional ammunition. N.T. 558-73, 578 ,625.

After petitioner was charged, he secured a private cell in the prison's hospital wing for eight months. N.T., 9/20/96, pp. 534-35. One day after his arrest, he hired two more attorneys in addition to Mr. Wochok, Richard Sprague and William Lamb, and signed his own name to a fee arrangement. N.T., 9/20/96, p. 109.

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[3] The Court will refer to these tape recordings as the "standoff tapes."

On April 15, 1995, this Court conducted an extensive bail hearing during which defense counsel and petitioners psychiatric expert witness sought to minimize petitioner's mental health status by contending that mental health treatment was "desirable but not necessary." N.T. 1154; N.T., 4/15/96, pp. 61-62. On April 30, 1996, the Court determined that petitioner posed a flight risk and denied his bail request.

Prior to trial, petitioner filed a plethora of motions in this Court as well as multiple appeals and emergency applications in the appellate courts. The Commonwealth also presented evidence that petitioner and his attorney attempted to delay his arraignment. A deputy sheriff testified that during arraignment, defense counsel told petitioner to keep answering "I don't know" to the prosecutor's questions. N.T. 2251-59; N.T., 9/20/96, pp. 614-21. 647-48.

Despite defense testimony that he did not need mental health treatment, petitioner claimed incompetency after failing to secure bail. His numerous appeals delayed a competency hearing until September 9, 1996. The Court concluded that the scales tipped "ever so slightly" in favor of a finding of present incompetency, and petitioner was transferred to Norristown State Hospital to commence mental health treatment.

Shortly after the competency hearing, petitioner fired attorneys Sprague and Lamb and hired new counsel, Thomas Bergstrom, to join remaining counsel, Taras Wochok and Joseph Labrum, for trial. On December 9, 1996, after a second competency hearing, the Court found that petitioner's condition had improved considerably, and that he was fully competent to stand trial. The Court also denied his renewed bail applications and his motion to suppress his statements in the standoff tapes.

Throughout his pre-trial incarceration, petitioner continued to run his multi-million dollar estate. He also managed to gain eighteen pounds during an alleged "hunger strike," presumably from food smuggled to him by visitors. N.T. 1818-22.

At trial, petitioner did not deny that he shot Schultz. Instead, he raised the affirmative defense of insanity through four expert witnesses - William Carpenter, M.D., Philip Resnick, M.D., Robert Sadoff, M.D. and Paul Applebaum, M.D. - who testified that petitioner did not know what he was doing was wrong at the time of the shooting. The defense experts claimed that petitioner believed that Schultz was going to kill petitioner and take over the country. N.T. 1057, 1377-78, 1394-99, 1744-47. Then, after arming himself with a powerful gun, petitioner experienced an "abrupt crystallization" of fear which impelled him to drive to Schultz' residence and murder him. N.T. 1448, 1526.

There were significant defects in petitioner's insanity defense. While petitioner raised many security concerns with his security consultant, he never mentioned anything about the KGB, Communist of terrorists. N.T. 2053, 2102. None of petitioner's experts were able to testify that he had ever expressed fear that Schultz was an international terrorist. Indeed, petitioner himself admitted in a videotaped interview less than six weeks after the shooting that he never feared Schultz. Petitioner's experts diagnosed him as a paranoid schizophrenic and acknowledged that he understood the nature of his act but did not appreciate the wrongfulness of shooting the victim.

The Commonwealth's two expert witnesses, Dr. John O'Brien and Dr. Park Dietz, opined that petitioner (a) harbored intense animosity toward Schultz but did not fear him; (b) understood the wrongfulness of his actions; and (c) was not insane when he killed Schultz. The Commonwealth

rebutted the defense diagnosis of paranoid schizophrenia and explained petitioner's history of erratic behavior with evidence of his extensive drug use and arrogant personality, both of which could be indulged with his extraordinary wealth. N.T. 1951-54, 1990-92, 2013-16, 2048-51, 2069-74, 2291, 2436-37. The Commonwealth demonstrated that there was no evidence of a "crystallization of fear" and virtually no evidence of a belief in a Communist plot. N.T. 2773, 2926. On the other hand, there was ample evidence of petitioner's hatred of Schultz due to Schultz's athletic achievements and popularity in the wrestling community that petitioner desperately sought but never obtained.

The Commonwealth showed that petitioner understood the wrongfulness of his acts by, inter alia, bringing a more powerful weapon to the crime scene than he customarily carried[4], fleeing the crime scene, barricading

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[4] Dr. Dietz, one of the Commonwealth's experts, observed:

> [T]he fact that the defendant usually carried his gun which shoots either .38 Special or .357 Magnum ammunition, but on the day of the homicide took with him a .44 Magnum revolver, a Model 29, which is much more...destructive round, a more powerful weapon, is significant to me in several respects. The first is tat it confirms he knew that something unusual was his purpose on January 26 of 1996. He was taking a different gun with him that he usually took. He was taking a more powerful gun. In fact, he was taking the gun that was made famous in the Dirty Harry movies as the most powerful handgun in the world. And...in taking that gun which he took with him before getting in the car with Pat [Goodale], we can know with certainty that the defense theory of an abrupt crystallization is incorrect. He did not have an abrupt crystallization in the car with Pat...[because h]e took the Dirty Harry gun with him before he got in the car with Pat.

N.T. 2727-28.

himself in his mansion for two days, refusing to answer any questions about the shooting during the standoff, and referring all questions about the shooting to his attorney. Furthermore, the Commonwealth proved that petitioner understood the wrongfulness of other bad acts, even during the period in which he was allegedly mentally ill. On one occasion, petitioner struck a flagman on the road but left the scene of the accident before the police arrived and flew to Minnesota. Upon landing, he immediately called his attorney to have him deal with the incident while petitioner remained in Minnesota to receive a wrestling award. N.T. 2065-68, 2633-34, 2727-28, 2732-34.

On February 25, 1997, the jury rejected petitioner's insanity defense and found him guilty but mentally ill of third degree murder and simple assault. On may 13, 1997, the Court sentenced petitioner to 13-30 years imprisonment on the murder conviction and a concurrent sentence of 3-6 months imprisonment on the simple assault conviction. Following the denial of post-sentence motions, petitioner hired the following team of attorneys to represent him during his direct appeal: Amy Adelson, Esquire, Alan M. Dershowitz, Esquire, Nathan Z. Dershowitz, Esquire, Victoria B. Eiger, Esquire, Norris E. Gelman, Esquire, Vincent J. Grogan, Esquire, A. Charles Peruto, Esquire and Kathryn L. Simpson, Esquire.

Petitioner filed a timely appeal to the Pennsylvania Superior Court, which affirmed his judgment of sentence on April 26, 1999. On June 29, 1999, the Superior Court denied petitioner's application for reargument and/ or reconsideration. On January 13, 2000, the Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal. On June 12, 2000, the United States Supreme Court denied petitioner's petition for writ of certiorari.

On March 22, 2001, petitioner filed a timely PCRA petition ("Original PCRA Petition"). On August 20, 2001, after reviewing submission from petitioner and the Commonwealth, the Court entered notice of intent to dismiss the Original PCRA Petition without a hearing. Petitioner moved for and obtained leave to file and Amended PCRA Petition, which he filed on December 2, 2002. On August 4, 2003, the Court entered a notice of intent to dismiss the Amended Petition without a hearing.

Today, the Court will dismiss the Amended PCRA Petition for the reasons articulated below.

STANDARD OF REVIEW

To be eligible for relief under the PCRA, petitioner "must prove by a preponderance of the evidence that the conviction or sentence he is collaterally attacking resulted from one of seven specific. . . circumstances [enumerated in] 42 Pa.C.S. § 9543(a)(2)[5]. . ." Commonwealth v. Jones, 571 Pa. 112, 811

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[5] Those circumstances are as follows:

(i) A violation of the Constitution of this Commonwealth or the Constitution of the United States which, in circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.
(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
(iv) The improper destruction by governments officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
(v) Deleted.
(vi) Te unavailability at the time of trial of exculpatory evidence that has

(Continued...)

A.2d 994, 999 (2002). Petitioner mainly raises claims of after-discovered evidence, 42 Pa.C.S. § 9543(a)(2)(vi), and ineffective assistance of counsel, § 9543(a)(2)(ii).

In addition, petitioner must prove that the issues he raises have not been waived or previously litigated. 42 Pa.C.S. § 9543(a)(3). A claim has been previously litigated if it has been reviewed by the highest court to which the defendant may appeal as of right. 42 Pa.C.S. § 9544(a)(2); Commonwealth v. Miller, 560 Pa. 500, 746 A.2d 592, 598 (2000). If a claim was not previously litigated but could have been raised on direct appeal, the defendant must also demonstrate that the failure to raise the claim on direct appeal was not the result of a rational or strategic decision. 42 Pa.C.S. § 9543(a)(4). Moreover, "a PCRA petitioner cannot obtain review of claims that were previously litigated by presenting new theories of relief, including allegations of ineffectiveness, to relitigate previously litigated claims." Commonwealth v. Bond, 572 Pa. 588, 819 A.2d 33, 39 (2002) (citing Commonwealth v. Bracey, 568 Pa. 264, 795 A.2d 935, 939 n.2 (2001); Commonwealth v. McCall, 567 Pa. 165, 786 A.2d 191, 196 (2001); Commonwealth v. Copenhafer, 553 Pa. 285, 719 A.2d 242, 253 (1998)). Thus, a claim is deemed previously litigated when the defendant re-characterizes, re-labels or slightly varies a claim already litigated on direct appeal.

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subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S. § 9543(a)(i)-(viii).

DISCUSSION

I. ROBERT CALABRESE'S RECANTATION OF HIS TRIAL TESTIMONY DOES NOT ENTITLE PETITIONER TO RELIEF.

Subsequent to trial, Robert Calabrese, one of the wrestlers on Team Foxcatcher, stated in an affidavit that the prosecution forced him to give false testimony accusing petitioner of ingesting cocaine. The Court concludes that Calabrese's recantation of his trial testimony does not entitle petitioner to relief under PCRA.

The context in which Calabrese testified was as follows: Petitioner's expert witnesses testified that at the time petitioner shot Schultz, he suffered from paranoid schizophrenia and did not know what he was doing was wrong. N.T. 1746 (Dr. Sadoff). The experts arrived at this diagnosis of insanity by pointing to petitioner's delusional behavior during the 48-hour standoff after the shooting and his subsequent declarations that he was Jesus Christ, the Dalai Lama, the last Russian czar, President of Russia, crown prince of Russia, President of the United States, the devil, the "fuhrer or co-fuhrer with Dave Schultz," and the "American 6," among others. N.T. 1735-36 (Dr. Sadoff). To explain their diagnosis to the jury, the experts first had to discuss petitioner's drug abuse and then rule it out as the reason for petitioner's behavior.

In rebuttal, the Commonwealth presented lay and expert testimony demonstrating that petitioner's behavior was the product of chronic drug and alcohol abuse instead of insanity. See, e.g., N.T. 2288 (Dr. O'Brien) (petitioner had "cocaine induced psychotic disorder with delusions"), 2295 ("strong indication that cocaine abuse existed"). After lengthy deliberations, the jury found petitioner guilty but

mentally ill, the middle ground between the parties' positions.

Robert Calabrese was one of several Commonwealth witnesses who testified about petitioner's cocaine abuse. Calabrese, who trained at Foxcatcher Farm for many years testified that he observed petitioner ingest cocaine on one occasion in 1988, eight years before Schultz death. N.T. 1990-91. Four years after trial, however, Calabrese swore in an affidavit that he never saw petitioner use cocaine; that his trial testimony was false; and that the prosecutors and their cohorts pressured him into giving perjured testimony. Amended PCRA Petition, p. 4 (citing Original PCRA Petition, exhibit "A"). Calabrese further averred that he repeatedly denied ever seeing petitioner use cocaine during pre-trial meetings with prosecutors and the Commonwealth's two experts, Drs. Dietz and O'Brien. Id. pp. 5-6. The experts allegedly took notes during their interviews with Calabrese, and a court reporter recorded Dr. Dietz's interview. Id. p. 6.

Based on Calabrese's affidavit, petitioner raises claims of after-discovered evidence, Brady violations and prosecutorial misconduct. According to petitioner, Calabrese's testimony "was the only direct evidence of cocaine use," without which the Court would never have admitted the other circumstantial evidence of petitioner's drug use into evidence or permitted Dr. O'Brien to testify that petitioner suffered from the effects of cocaine-induced psychosis at the time of the shooting. Id., pp. 6-7 (emphasis in original). Petitioner further contends that the prosecutors violated Brady and engaged in misconduct by (a) failing to disclose notes and transcripts from Calabrese's interviews with Drs. Dietz and O'Brien and other denials that he

observed petitioner use cocaine, and (b) forcing Calabrese to give "the story they wanted him to give from the witness stand.[6]" Id.

To warrant relief under the PCRA, after-discovered evidence must satisfy a four-part test: (1) the evidence could not have been obtained before the conclusion of the trial by reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence will not be used solely for purposes of impeachment; and (4) the evidence is of such a nature and character that a different outcome is likely. Commonwealth v. Dennis, 552 Pa. 331, 715 A.2d 404, 415 (1998) (citing Commonwealth v. McCracken, 540 Pa. 541, 659 A.2d. 541 (1995); Commonwealth v. Wilson, 538 Pa. 485, 649 A.2d 435 (1994)).

The Court will assume that the Commonwealth failed to disclose interview transcripts in which Calabrese denied seeing petitioner use cocaine, and that petitioner was entitled to receive these transcripts during discovery. Consequently, the Court will assume that the petitioner satisfies the reasonable diligence prong of the after-discovered evidence test[7]. The Court will further assume that petitioner meets the

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[6] Petitioner's Original PCRA Petition also included a claim of ineffective assistance of counsel due to his attorneys' alleged failure to request the interview transcripts during discovery. Petitioner has withdrawn the ineffective assistance claim from his Amended PCRA Petition.

[7] The Court expresses no opinion on whether the Interview transcripts exist, or whether the Commonwealth did or did not conceal such evidence from petitioner. The Court believes that these are factual matters that cannot be decided as a matter of law. No evidentiary hearing on these issues is necessary, however, due to petitioner's failure to satisfy the fourth prong of the after-discovered evidence test. See pp. 14-20, infra.

second and third prongs of this test due to the Commonwealth's failure to analyze these requirements. See Commonwealth's Response to Original PCRA Petition, pp. 5-15 (contending only that petitioner has failed first and fourth prongs without addressing second or third prongs).

Nevertheless, petitioner is not entitled to relief due to his resounding failure to demonstrate that his matter would have changed the outcome of the trial. Calabrese testified that he observed Petitioner use cocaine just once ,eight years before the shooting. It is inconceivable that the verdict would have been different in the absence of this testimony, given the overwhelming direct and circumstantial evidence[8] of petitioner's drug use. Much of this evidence came from Commonwealth witnesses, including other wrestlers. Moreover, petitioner's own experts and other defense witnesses testified that petitioner had used drugs, and that his drug use was far more extensive than the single instance noted by Calabrese. Indeed, it was the defense that first introduced evidence of petitioner's drug use in an attempts to prove that it was not the cause of his behavior on January 26, 1996.

There was not mention of petitioner's drug use during the Commonwealth's case-in-chief. The defense, however, presented four witnesses during the defense-in-chief who testified about petitioner's drug use. Dr. Carpenter, petitioner's first psychiatric expert, mentioned cocaine use

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[8] "Direct" evidence is "testimony by a witness from his own personal knowledge, such as something that he saw or heard himself," e.g., Calabrese's observation of petitioner snorting cocaine. Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d. 183, 195 (1985). "Circumstantial" evidence is "testimony about facts which point to the existence of other facts which are in question." Id.

six times. See N.T. 1026 ("A number of people suspected that he might use cocaine and would observe him with nasal congestion or sniffing or doing something where they would think it likely that he used cocaine. . .I assumed that he might well have used cocaine"); N.T. 1030 ("there would be the suggestions" that petitioner was "a cocaine abuser"); N.T. 1108 ("a number of people had the general suspicion that cocaine would have been used"); N.T. 1109-11 ("records over the years" showed "potential" that defendant used cocaine; "my own medical opinion was that he probably had, at some times used cocaine. . .and there were also some reports that his disappearing and then sniffling from the nose or having nasal congestion, things that could have been caused by applying cocaine in the nose. So that I assumed that cocaine had been there"); N.T. 1133 ("I suspect that he did use cocaine").

Dr. Resnick, another expert, referred four times to cocaine use. N.T. 1341 (cocaine "might be involved in the case"); N.T. 1343 (petitioner "may have used cocaine"); N.T. 1432 (I did become aware from interviewing witnesses that there was a suspicion that [petitioner] used cocaine for a period of time"); N.T. 1433 ("cocaine use in his past").

Dr. Sadoff, a third expert, mentioned drugs on five occasions while opining that drugs did not cause petitioner to shoot Schultz. N.T. 1722 ("I ask everybody I see" whether they use alcohol or drugs); N.T. 1725 (there were "suspicions. . . in the records" that petitioner was using drugs); N.T. 1732 ("I considered the diagnosis of a substance abuse psychosis. I rule that out. . . even though substances such as cocaine or alcohol can sometime aggravate a condition of paranoid schizophrenia. Cocaine we know can also induce or cause a psychotic reaction"); N.T. 1750 ("I had to consider" whether petitioner's condition resulted from a "toxic substance"); N.T. 1794 ("he told me he never used drugs. We have no hard evidence that he's ever used drugs,

but he may have"); N.T. 1821 ("I would be very surprised" if petitioner used controlled substances in prison).

Alexander Devany, a lay witness, testified that he "had suspicions" of petitioner's drug problem and attributed petitioner's erratic behavior to his drug problem. On several occasions, Devany went to law enforcement officials to discuss finding petitioner's source of cocaine and having him arrested[9]. N.T. 1251-52.

After the defense rested, the Commonwealth called Calabrese and three other wrestlers: Trevor Lewis, Brian Dolph, and Daniel Chaid. Lewis, Chaid and Dolph provided objective details indicating petitioner's considerable drug use during the years prior to Schultz's death.

Lewis, who trained and resided at Foxcatcher for over five years, testified that petitioner

> Was very hyper. He couldn't sit in one place for any period of time more often than ten or fifteen minutes. He would get up and down out of his chair and go into the library, probably twelve time a night. . . in a three hour period. He'd pace up and down the halls. . . He would sit there and he would bob in his chair a little bit. And he was always wiping his nose with tissues and sniffing and

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[9] Dr. Applebaum, a fourth expert who testified on surrebuttal, referred to cocaine multiple times. N.T. 2882-92 ((lengthy discussion why cocaine use did not explain petitioner's symptoms); N.T. 2956 ("a number of people. . . made some reference during the interviews to their suspicions of cocaine use by [petitioner]"); N.T. 2957 ("clearly not true" when petitioner said he never used cocaine); N.T. 2958 ("abundant evidence that. . . he used cocaine").

> occasionally he had bloody noses and had white powder on the edge of his nose frequently.

N.T. 2007, 2015. Chaid testified that

> At times we would be in the big house and some of the wrestlers would be in the trophy room area and we'd be talking and hanging out with [petitioner], spending time with him, he would make frequent trips into the library and. . . he'd come out and he would have white powder marks underneath the nostrils of his nose, and he would usually come out and have change of behavior. He'd be rather excited, giddy, sometime wide-eyed and he'd be obsessive about stuff at that time.

N.T. 2069-70. Dolph, who resided at Foxcatcher for two years, testified that he saw petitioner on a daily basis, and that petitioner

> Was very hyper and he was always going in and out of the library in the evenings. I would say, probably ten to fifteen times in the evening. And he was always pacing up and down the hallway. And he'd come in and look in the trophy room and maybe sit down for five or ten minutes, and then get up and go in the library and do the same routine. . . He always carried a napkin with him, a Kleenex, you know, and he was always sniffing, always. And as soon as he came out of the library, I'd hear (indicating) really loud, you know, and he'd come in and then he would be wiping his nose, and he was always sniffing. And, occasionally, he'd be sitting on the chair

> and I'd notice white mucus running downs, like powder and mucus mixed together running down his nose. And then he'd wipe it and sniff.

N.T. 2047, 2049-50.

In view of this vast body of evidence, it is difficult to envisage how exclusion of Calabrese's testimony would have changed the verdict. As the Commonwealth observed, Calabrese's testimony "was a relatively minor piece of evidence in rebutting the defense claim that [petitioner] killed Dave Schultz because he suffered from paranoid schizophrenia. The absence of Calabrese's direct testimony, contained in only three pages of transcript (N.T. 1988-91) would not have 'devastated' (Petitioner's Memorandum, at 7) the Commonwealth's case; it would have had virtually no impact." Commonwealth's Response to Original PCRA Petition, pp. 11-12.

Nor can the Court imagine that the verdict would have differed had the defense counsel cross-examined Calabrese with the alleged transcripts containing Calabrese's denial that petitioner used drugs. Such impeachment efforts would have been buried under the mountain of testimony establishing petitioner's serious drug abuse[10]. "[Since] there is nor reasonable doubt of guilt- whether or not the additional evidence is considered, there is no justification for a new

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[10] Indeed, it might have disadvantaged the defense to cross-examine Calabrese with the alleged interview transcripts, since this tactic might have discredited the portions of Calabrese's testimony that supported petitioner's insanity defense. N.T. 1999-2000 (Calabrese's testimony that petitioner put razor wire in the walls, dug tunnels on the property and made Calabrese watch videotapes to look for any movement on the property).

trial." Copenhafer, supra, 719 A.2d at 259; see also id. at 260 n. 15 ("in order to be entitled to a new trial owing to the prosecution's failure to disclose evidence bearing on the credibility of its witnesses, appellant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence").

Petitioner insists that Calabrese's testimony was the only direct evidence of petitioner's drug use, and that Calabrese's recantation of this direct testimony renders inadmissible all circumstantial evidence of petitioner's drug use. The Court disagrees for two reasons. First, Calabrese was not the only witness to provide direct evidence of petitioner's cocaine use. Brian Dolph's testimony (p.17, supra) constitutes direct testimony that he heard petitioner ingest cocaine. See footnote 8 (definition of direct testimony). Second, and more importantly, even if Calabrese provided the only direct testimony of drug use, and this testimony were excluded from evidence, the circumstantial evidence of petitioner's drug use remained admissible. Standing alone, "circumstantial evidence is sufficient to sustain a conviction 'so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.'" Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630, 635 (1991) (citing Commonwealth v. Steele, 522 Pa. 61, 559 A.2d 904, 909 (1989); Commonwealth v. Hardcastle, 519 Pa. 236, 246, 546 A.2d 1101, 1105 (1988)). "Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilty beyond a reasonable doubt." Id. (citing Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610, 618 (1989)); see also Commonwealth v. Puksar, 559 Pa. 358, 740 A.2d 219, 223 (1999) (citing Commonwealth v. May, 540 Pa. 237, 656 A.2d 1335, 1340 (1995))

("circumstantial evidence alone is sufficient to convict on of a crime, including first degree murder")[11].

Since circumstantial evidence by itself can establish guilt, it can also establish any other fact at issue, such as petitioner's drug use, in the absence of direct evidence.[12] It seems rather disingenuous that petitioner claims Calabrese's recantation negates all circumstantial evidence of his drug use after petitioner took the lead in adducing much of this evidence through five defense witnesses and opened the door for the Commonwealth to present further evidence on this subject.

Petitioner makes much of the Court's remark that there would be a "huge problem" if the prosecution did not present direct evidence of petitioner's cocaine use. N.T.

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[11] See also Commonwealth's Response to Defendant's Concise Statement of Matter Complained of on Appeal, pp. 30-31 ("drug use, like any other matter, can be shown by circumstantial evidence and not just by direct evidence of ingestion. . . There is no 'direct evidence' or even 'best evidence' rule that applies to the matter of substance abuse").

[12] Indeed, even if Lewis, Chaid and Dolph only provided circumstantial evidence, their testimony was as convincing as the hornbook example of circumstantial evidence in Pennsylvania's standard jury instructions:

> A man may be able to testify that it was snowing at a particular time because he looked outside and saw the snow falling. If however, he did not actually see the snow coming down, but when he got up one morning and looked outside he saw fresh snow where there was none the night before, he can testify to these facts and the jury may infer from those facts that it had snowed during the night.

Pennsylvania Suggested Standard Civil Jury Instructions, § 5.07.

1824. The Court, however, uttered this remark before the Commonwealth presented the testimony of Lewis, Chaid and Dolph. Even if this testimony was circumstantial, it was equivalent in quality and admissibility to any direct evidence of petitioner's drug use[13]. Chambers; Puksar.

Simply put, the issue of Calabrese's testimony does not entitle petitioner to relief. Calabrese was only on of many witnesses to describe petitioner's cocaine use, and his testimony took up only eighteen pages out of a transcript that far exceed 3000 pages. Therefore, Calabrese's recantation of his trial testimony and the Commonwealth's alleged failure to divulge his prior inconsistent statements does not constitute a violation of petitioner's constitutional right to due process that "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i).

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[13] Petitioner repeatedly states that the Commonwealth informed defense counsel that it would not use Calabrese as a rebuttal witness but then substituted Calabrese for Paul McCarthy when McCarthy refused to testify. See, e.g., Petitioner's Answer to Commonwealth's Response to Original PCRA Petition, p. 8. McCarthy's role, petitioner claims, was to supply direct evidence of petitioner's cocaine, but "when McCarthy, without warning, disappeared from the witness screen, Calabrese unexpectedly appeared to supply the mandated nexus of direct use." Petitioner's diatribe relating to McCarthy's failure to testify and Calabrese's surprise appearance is totally irrelevant. The only issue that matters is whether the verdict would have changed if Calabrese had not testified of if he had been cross-examined with his alleged denials that petitioner used cocaine. On that issue, petitioner cannot prevail.

II. TRIAL COUNSEL ACTED REASONABLY IN RAISING AN INSANITY DEFENSE ON PETITIONER'S BEHALF INSTEAD OF THE INVOLUNTARY INTOXICATION DOCTRINE, A DEFENSE NOT FORMALLY RECOGNIZED IN THE COMMONWEALTH OF PENNSYLVANIA.

During trial, petitioner presented an insanity defense which featured the testimony of four renowned forensic psychiatrists that petitioner was suffering from paranoid schizophrenia on the day he shot Dave Schultz. Petitioner now insists that his attorneys were ineffective[14] for presenting an insanity defense, and that they should have mounted the defense of involuntary intoxication based upon his ingestion of N-butyl scopolamine, a medication prescribed by Bulgarian physicians less than one month before the shooting. Amended PCRA Petition, pp. 8-18. He further claims that his attorneys were ineffective for failing to gauge the effect of scopolamine upon his behavior despite learning of the prescription almost one year before trial[15]. Id.

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[14] In order to prevail on a claim of ineffective assistance of counsel, petitioner must establish that (1) his underlying claim is of arguable merit; (2) counsel's action or inaction was not the product of any reasonable strategic decision; and (3) he suffered prejudice as a result of counsel's error. Commonwealth v. Pursell, 724 A.2d 293 (1999). Petitioner fails the first two prongs of this test, making it unnecessary to discuss the third element.

Petitioner consistently raises "layered" claims of ineffectiveness, i.e., accusations that trial counsel acted ineffectively and that appellate counsel failed to preserve the issue of trial counsel's ineffectiveness. The Court finds that trial counsel acted effectively at all times thus mooting the issue of appellate counsel's (in)effectiveness.

[15] Petitioner's Original PCRA Petition also claimed that his discovery of the harm caused by scopolamine constituted after-discovery

(Continued...)

The Court finds petitioner's revisionist theory of the events unconvincing. To this day, Pennsylvania courts have not formally recognized the defense of involuntary intoxication. Petitioner's attorneys cannot be held ineffective for eschewing a defense that may well have been void at the time of trial. Moreover, petitioner's attorneys had ample reason for proffering an insanity defense, since all of petitioner's physicians and experts agreed he was suffering from paranoid schizophrenia at the time of the shooting.

A. Petitioner's claim that his attorneys should have raised an involuntary intoxication defense is not arguably meritorious, since this defense does not exist under Pennsylvania Law.

Although Pennsylvania has long recognized the defense of involuntary intoxication under limited circumstances, Commonwealth v. Kuzmanko, 709 A.2d 392, 399 (Pa. Super. 1998), no appellate court has ever expressly accepted the defense of involuntary intoxication. As recently as August 19, 2003, the Superior Court observed that it is unclear whether the defense of involuntary intoxication is viable in Pennsylvania:

> Pennsylvania like many other jurisdictions, either by statute or caselaw, specifically limits the availability of a voluntary intoxication defense but does not specify whether an involuntary intoxication defense is available. See 18 Pa.C.S. § 308 (stating that evidence of voluntary intoxication is admissible where it is relevant "to reduce murder from a higher to

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evidence. He has abandoned this theory in his Amended PCRA Petition.

> a lower degree of murder.") In Commonwealth v. Collins, 810 A.2d 698, 700 (Pa. Super. 2002), we recently noted that the "issue of whether involuntary intoxication is a defense to a DUI charge is unclear in Pennsylvania. See Committee Note, P.A.S.S.J.I.Crim. 8.308(c) (stating that 'the existence and scope of the defense of involuntary intoxication is not yet fully established is Pennsylvania law.'); see also Commonwealth v. Griscom, 411 Pa. Super. 49, 600 A.2d 996, 997 (Pa. Super. 1991) (concluding that the Pennsylvania appellate courts have not determined involuntary intoxication to be a viable defense against a DUI charge)."

Commonwealth v. Smith, 2003 WL 21962482, *2 (Pa. Super., 8/19/03). Pennsylvania Courts have referred to involuntary intoxication as a viable defense on "in theory," Commonwealth v. Kuhn, 327 Pa. Super. 72, 475 A.2d 103 (1984) (Montemuro, J., concurring) ("No Pennsylvania case has ever held that the defense of involuntary intoxication is a viable one"), and only as "abstract principle." Griscom, supra, 600 A.2d at 997-98 ("while involuntary intoxication may, as an abstract principle, be a defense to a crime, no Pennsylvania appellate court has yet to hold that the defense of involuntary intoxication is a viable one")[16].

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[16] There exists a twenty-three year old trial court case which holds that the defendant can raise an involuntary intoxication defense. Commonwealth v. Butterfield, 17 D. & C. 3d 62 (1980). Butterfield, however, acknowledged that no Pennsylvania appellate court has upheld such a defense. Moreover, the facts in this case were far different from the instant case. The defendant became intoxicated

(Continued...)

Petitioner argues without success that the Supreme Court accepted involuntary intoxication as a defense in Commonwealth v. Crozier, 1 Brewster 349 (1867). Crozier merely held that evidence of drunkenness could be used only to reduce the degree of murder, unless the defendant's delirium tremens resulted in insanity. No subsequent Pennsylvania decision had read Crozier as recognizing the defense of involuntary intoxication.

Even more misguided is petitioner's construction of Pennsylvania's voluntary intoxication statute, 18 Pa.C.S. § 308:

> Neither voluntary intoxication nor involuntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition may be offered by the defendant whenever it is relevant to reduce the murder from a higher degree to a lower degree of murder.

Petitioner declares: "Because there is no corollary statute in Pennsylvania defining 'involuntary' intoxication or drugged condition, the logical and recognized inference is that involuntary intoxication *is* a defense, and a complete defense at that." Petitioner's Response to Court's Notice of Intent to Dismiss Original PCRA Petition Without Hearing, p. 18. The Court disagrees. Had the legislature intended to recognize involuntary intoxication as a defense, "it would

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from inhaling dangerous fumed while driving a car that had been recently painted. He had no idea that he was intoxicated or that he had ingested and intoxicant.

have expressed that intent clearly [through enactment of legislation] rather than sub silentio." Duciai v. Dennis, 540 Pa. 103, 656 A.2d 102, 106 (1995). The fact that the legislature has codified the voluntary intoxication defense but remains silent with regard to involuntary intoxication means that it dos not recognize the latter doctrine. Atcovitz v. Gulph Mills Tennis Club, Inc., 571 Pa. 580, 812 A.2d 1218, 1223 (2002) (inclusion of specific matter in a statute implies the exclusion of other matters).

Simply put, neither the legislature nor our appellate courts have formally recognized the doctrine of involuntary intoxication. Petitioner cannot accuse his attorneys of ineffectiveness for failing to raise a defense that does not yet exist. Commonwealth v. Trivigno, 561 Pa. 232, 750 A.2d 243, 253 (2000) (counsel cannot be ineffective for failing to anticipate a change in the law).

B. Counsel's decision to raise an insanity defense was a reasonable strategic decision.

It was eminently reasonable for petitioner's attorney to present an insanity defense, since numerous defense experts agree that petitioner was suffering from paranoid schizophrenia based on substantial evidence of petitioner's mental illness[17].

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[17] Even if defense counsel should have found the scopolamine before trial and questioned petitioner, his staff and his treating physicians about the effects of this medication, it would have been far wiser to present an insanity defense than it would have been to mount an involuntary intoxication defense, given the substantial body of evidence supporting the former defense and the doubtful legality of the latter doctrine.

Ten psychiatrists either testified at trial or submitted reports stating that at the time of the crime, petitioner was suffering from a mental illness. Brief in Support of Petitioner's Post-Sentence Motions, p. 13. Dr. Carpenter, the first defense expert, testified that to a reasonable degree of medical certainty, petitioner suffered from paranoid schizophrenia, a disease characterized by delusions (strongly held beliefs "that are false [and] are not shared by others who are in similar circumstances"), disorganized thought processes and bizarre emotions (e.g., silly giggling upon receipt of bad news, extreme sadness for no reason). N.T. 967-70, 993 (Dr. Carpenter). The component of paranoia "refers to unreasonable and unrealistic fears that develop[18]." N.T. 977 (Dr. Carpenter). Three other defense experts concurred in this diagnosis. N.T. 1340 (Dr. Resnick); N.T. 1731 (Dr. Sadoff): N.T. 2877 (Dr. Applebaum). Even the Commonwealth's experts agreed that petitioner suffered from a mental disease. N.T. 2287 (Dr. O'Brien; N.T. 2721 (Dr. Dietz).

The defense acknowledged that petitioner knew the nature and quality of his act but contended he did not know his act was wrongful. N.T. 1348 (Dr. Resnick);N.T. 1741 (Dr. Sadoff);N.T. 2916 (Dr. Applebaum). In other words,

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[18] Such fears include "the ones we're accustomed to thinking about when people believe that people are out to get them or out to hurt them; that rumors are being spread in the workplace around them; that they can tell when there is laughter in the lunchroom that that laughter is directed toward them. But it also has fears, [such as] the FBI using a computer to direct your brains. . . [T]hese can be persecutory in their nature but are false and fixed belief systems that are not shared by others. They can be as absolutely compelling as anything. . . [T]he false belief that you're about to be harmed can compel action just as much as a realistic belief that your going to be harmed." N.T. 977-78 (Dr. Carpenter).

petitioner knew he had a gun; knew the gun was loaded with bullets; knew he was using the gun to kill Dave Schultz; but did not know that it was wrong to kill Schultz. Through lay witnesses and experts, the defense contended that petitioner was operating under a delusion in which he perceived Schultz as a threat to him at the time of the shooting and therefore did not that it was wrong to kill him.

In order to demonstrate petitioner s paranoid schizophrenia, the defense adduced considerable evidence that petitioner had numerous delusions and acted on these delusions for years before the shooting. Petitioner believed he was Dalai Lama, N.T. 158, 639, 769, and as a result, he purchased a Dalai Lama suit[19], N.T. 2169. He believed someone was crawling in the walls of his mansion, N.T. 758-60, 1657, 1997, 1999, 2025-26, and as a result, he installed razor wire in the walls, N.T. 758-59, 1659, 1999, 2023-25. He believed underground tunnels were located under the estate, N.T. 760-62, 765-67, 1999, 2027-38, and as a result, he ordered holes dug to find them, N.T. 760-62, 878-80, 1370-76, 1999, 2027-28. He believed that his attorneys, Richard Sprague and William Lamb, were in a conspiracy against him with the district attorney and the judge, and as a result, he fired them. N.T. 97-98.

Moreover, and most importantly, there were ample facts from which defense counsel was able to portray the murder of Dave Schultz as the product of another delusion. Petitioner believed he was the target of a Russian KGB

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[19] Petitioner claimed at other times that he was Jesus Christ, the Dalai Lama, the last Russian czar, President of Russia, crown prince of Russia, President of the United States, the devil, the "fuhrer or co-fuhrer with Dave Schultz", and the "America 6." N.T. 1735-36 (Dr. Sadoff).

conspiracy and feared for his life. N.T. 639-40, 648, 652-54, 1658. Petitioner believed Schultz was participating in the conspiracy because he spoke Russian and often wore Russian military clothing. N.T. 249, 1957-98, 1923-24. In petitioner's mind, the conspiracy escalated after (a) arson fires in October 1995 burned two buildings on the estate and (b) petitioner suffered a head injury in November 1995 in which he believed a Russian soldier struck him with a baseball bat. N.T. 776, 1596.

The defense presented evidence that nine days before the murder, petitioner traveled to San Francisco. After he returned, he told multiple witnesses that he learned during the trip that "the threat was on the farm." N.T. 777, 1606. At the same time, Schultz was constructing a bazooka capable of firing bottle rockets. N.T. 1997, 2002-05. Schultz told several witnesses that he was building this weapon to counter petitioner's addition of a .50 caliber machine gun which petitioner intended to mount on his armored personnel carrier. The night before the shooting, petitioner told Anthony DeHaven, a wrestler, that "one of your friends is playing games with me. . . No, Tony, this is serious, my life could be in danger." N.T. 1662.

On the day of the murder, petitioner drove to Schultz's house with "an eyewitness, Pat Goodale, so if he intended to commit an act and get away with it, in the way that someone would plan a crime, that wouldn't make sense." N.T. 1400 (Dr. Resnick). Moreover,

> [petitioner] did what is consistent with his paranoid delusions. He perceived David Schultz to be the person who was about to assassinate him and he killed only David Schultz. He didn't kill Nancy Schultz. He didn't kill Pat Goodale. He did the one thing that he felt justified in doing out of fear and as

> an act of war. And he did not believe that shooting David Schultz was wrong even though he recognized that shooting a human being under other circumstances where your life is not in danger was wrong.

N.T. 1401 (Dr. Resnick). Petitioner, the defense said, had no rational basis to kill Schultz:

> [Petitioner] was a close associate of David Schultz, he viewed [Schultz] as a protector, and . . . Nancy Schultz said . . . that she knew of no rational reason that [petitioner] would have to kill her husband. So I could not find any rational reason to do it but we do have the mounting fear based on a delusional basis which would explain the crime.

N.T. 1402 (Dr. Resnick).

> During the ensuing standoff between petitioner and the police, petitioner stated there was a war between the Soviet Union and the United States. He referred to himself as the Head of State and said that he should have diplomatic immunity, requested that the White House be called& He s not referring to [the shooting] as an angry killing of a common criminal. He perceives what s going on here as an international conspiracy and the shooting was an act of war.

N.T. 1396-97 (Dr. Resnick).

Furthermore, petitioner continued to behave in a delusional manner long after the murder. On August 23, 1996, Mr. Sprague stated as an officer of the Court that

petitioner was delusional and still believed he was the Christ child and the Dalai Lama. On the same date, Dr. Resnick testified that petitioner suffered from paranoid schizophrenia and believed he was President of the United States and that the CIA could kill him[20].

In view of petitioner's numerous delusions and the array of experts who were willing to opine that petitioner suffered from paranoid schizophrenia, it was entirely reasonable for defense counsel to raise an insanity defense. On the other hand, had defense counsel contended that petitioner killed been no way to explain petitioner s bizarre behavior for the years before the murder or the year afterward. It is easy to envision PCRA counsel running to court in the wake of an unsuccessful scopolamine defense, pronouncing trial counsel ineffective for failing to raise an insanity defense, and filing a massive brief with detailed affidavits from Drs. Carpenter, Resnick, Sadoff, and Appelbaum in tow. That would have been a meritorious PCRA claim; the instant claim, on the other hand, is not.

Therefore, the Court concludes that petitioner's scopolamine argument does not warrant relief under the PCRA.

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[20] The Court also obtained independent evidence of petitioner's illness after trial. On May 13, 1997, the Court s independent physician, Dr. Mechanick concluded petitioner was severely mentally disabled. The Court observed: "I first had the opportunity to evaluate [petitioner's] mental status in September of 1996 at the first competency hearing. I observed at the conclusion of the hearing that [petitioner] was gravely ill . . . and that he had been gravely ill for a considerable period of time in advance of that determination."

III. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE THAT PETITIONER REFUSED TO TALK ABOUT THE SHOOTING AND ASKED TO SPEAK WITH HIS ATTORNEY DURING THE STANDOFF WITH THE POLICE.

Following the shooting, petitioner barricaded himself in his mansion for the next two days. During the standoff, police negotiators communicated with him in taped telephone conversations in an attempt to convince him to surrender. Petitioner refused to cooperate. Instead, he threatened to "play with my toys" (fire his many weapons) and use "the fireball"; repeatedly demanded to see his attorney, Taras Wochok; and refused to answer questions concerning the shooting or his reasons for remaining in his mansion. N.T. 1070-71.

During trial, the Commonwealth contended that petitioner's statements that he would not talk about the shooting and his demands to see his attorney demonstrated that he knew what he was doing was wrong and that he was not legally insane at the time of the shooting. N.T. 2309-10, 2315, 2320, 2326 (O'Brien); 2732-33 (Dietz). Petitioner now claims that trial counsel was ineffective for (a) failing to object to introduction of this evidence on the ground that it violated petitioner's Fifth Amendment right against self-incrimination and (b) failing to request an instruction on the proper use of this evidence.

For the following reasons, the Court concludes that petitioner fails each prong of the test for ineffective assistance of counsel[21].

A. There is no arguable merit to petitioner's argument, since the evidence in question was admitted for the proper purpose of rebutting his insanity defense.

The issue in question - whether an individual's pre-arrest, pre-Miranda refusal to discuss his conduct with police and demand to speak with his attorney are admissible to rebut his insanity defense - is one of first impression under Pennsylvania law. After careful review of analogous decisions, the Court concludes that evidence of pre-arrest silence is admissible for this narrowly circumscribed purpose.

It is well-settled that the Commonwealth cannot use the defendant's silence following Miranda warnings for impeachment purposes. Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976). Nor may the Commonwealth use post-arrest, post-Miranda silence as affirmative proof of sanity when attempting to rebut an insanity defense. Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L.Ed.2d 623 (1986). Post-Miranda silence "does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." Id., 474 U.S. at 295 n. 13. "The underlying hypothesis of both Doyle and Wainwright is the tacit assurance contained in Miranda warnings that silence will carry no penalty and the

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[21] See footnote 14, supra, (defining standard for ineffective assistance of counsel).

fundamental unfairness of subsequently allowing the use of that silence to later impeach an explanation subsequently offered at trial." Commonwealth v. Hunsberger, 523 Pa. 92, 565 A.2d 152, 154 (1989) (citing Wainwright, supra, 474 U.S. at 291, 106 S. Ct. at 638).

Recently, Pennsylvania appellate courts have twice examined the admissibility of the defendant's pre-arrest silence under the Fourteenth Amendment. In Commonwealth v. Bolus, 545 Pa. 103, 680 A.2d 839 (1996), the defendant testified during trial and was cross-examined with questions regarding his pre-arrest failure to cooperate in the police investigation. The Supreme Court held:

> [W]hen a defendant waives his right to remain silent and testified at his own trial, neither the United States [Constitution] nor the Pennsylvania Constitution prohibit a prosecutor from impeaching a defendant s credibility by referring to his pre-arrest silence. Because in the instant matter [the defendant] had testified at his trial, he has waived any right to complain that the prosecutor had impermissibly commented on his pre-arrest silence.

Id., 680 A.2d at 844. The Court "[left] for another day the question of whether a prosecutor may introduce evidence of a criminal defendant s pre-arrest silence when the defendant exercises his constitutional right to remain silent and does not testify at his own trial."

In the second case, Commonwealth v. DiNicola, 797 A.2d 966 (Pa. Super. 2000) (en banc) ("DiNicola II")[22], appeal granted, 572 Pa. 763, 819 A.2d 546 (2003), the prosecution introduced evidence of the defendant's pre-arrest silence before the defendant testified. The Superior Court held that unlike the situation in Bolus, the reference to the defendant's pre-arrest silence did not occur during the defendant's testimony. Instead, "the testimony regarding [the defendant's] silence occurred without reference to [the defendant's] credibility when the prosecutor cross-examined [a police] trooper *prior* to [the defendant] taking the stand." Id., 797 A.2d at 971. Although the Court acknowledge that "reference to pre-arrest silence when cross-examining the defendant does not violate the Fifth Amendment right to remain silent because the defendant, like any other witness, has opened himself . . . to impeachment by taking the stand," Id. (citing Jenkins v. Anderson, 447 U.S. 231, 238, 100 S. Ct. 2124 (1980)), it held that reference to pre-arrest silence is not admissible before the defendant testifies "unless, subject to an offer of proof, it is probative of the defendant s credibility and the defendant will not be unduly prejudiced by its admission." Id.

Clearly, petitioner s refusal to talk to police about the shooting and his demands for counsel are not protected under post-Miranda-warning decisions such as Doyle or

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[22] The DiNicola case had been before the Superior Court on a prior occasion, resulting in a published panel opinion, Commonwealth v. DiNicola, 751 A.2d 197 (Pa. Super. 2000) ("DiNicola I"). DiNicola I asserted that unlike the defendant in Bolus, DiNicola did not testify, and therefore the evidence of his pre-arrest silence was inadmissible to demonstrate his consciousness of guilt. DiNicola II observed that DiNicola I was erroneous, since DiNicola did in fact testify during trial. Nevertheless, DiNicola II held that DiNicola was entitled to a new trial for the reasons summarized in the text.

Wainwright, since he was not under arrest or given Miranda warnings at the time of his communications with police negotiators. The policy undergirding these cases - silence after Miranda warnings should carry no penalty - simply is ~~not implicated~~ in the case at bar[23].

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[23] For the same reason, Hunsberger, supra, is distinguishable from the instant case to the extent that is ordered suppression of the defendant's post-Miranda statements. Hunsberger addressed whether the Commonwealth may introduce "a defendant s extemporaneous statements made after being given and invoking his Miranda rights . . . as evidence to rebut an insanity defense." Id., 565 A.2d at 153 (emphasis added). These "extemporaneous statements" included:

> 1. [The defendant's] question to [the district attorney] after being advised that he would be able to receive a public defender: 'Are public defenders as good as money lawyers?'
>
> 2. [The defendant's] question to [the district justice] at the time of his preliminary arraignment in which he asked: 'How can I get to see the public defender on the sixth floor of the courthouse if I am in jail?'
>
> 3. [The defendant's] question to [a deputy district attorney] when she approached him in the [police barracks] as to whether she was his lawyer, and when she replied in the negative, his statement that he did not want to speak to her.

Id. Our Supreme Court reasoned that the first two statements were admissible:

> It is clear that the common thread which runs throughout Wainwright is emphasizing the *silence* of the defendant or of his exercise of that right. In the case before us, however, we are not faced with [the defendant's] silence but with his comments following the invocation of his right to remain silent . . . The statements at issue are not comments by the prosecutor regarding the [defendant's] invocation of his right to remain silent; they are statements of the [defendant's] intent to elicit information regarding either his attorney or the

(Continued...)

Nor does Pennsylvania's pre-arrest jurisprudence protect these communications. Both Bolus and DiNicola II are inapposite on the ground that addressed whether evidence of pre-arrest silence is admissible to demonstrate consciousness of guilt, as opposed to the defendant's sanity. Due to this distinction, and due to the absence of other Pennsylvania pre-arrest cases on point, it is permissible to consult other jurisdictions for persuasive authority. The Court agrees with State v. Harms, 263 Neb. 814, 643 N.W.2d 359 (2002), in which the Nebraska Supreme Court reasoned that the defendant's pre-arrest silence, including multiple requests for counsel, was admissible to rebut his insanity defense:

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obtaining of ant attorney. The statements in question, excepting for the third statement, cannot remotely be indicative of the [defendant s] intent to remain silent. They are neither utterances which in and of themselves can be deemed inculpatory, nor were they questions solicited by authorities following [the defendant's] expression of his intent to invoke his Fifth Amendment rights.

Id. at 155 (emphasis in original). The Court, however found that "statements which *directly* bear upon [the defendant's Fifth Amendment rights], whether voluntary or elicited through questioning . . . are safeguarded by the Fifth Amendment and Wainwright." Id. Consequently, the defendant s question to the deputy district attorney as to whether she was his attorney and his statement that he did not want to talk to her any further "impl[ied] that [he] would speak only to his attorney. We, therefore, affirm the suppression of that single statement." Id.

Had petitioner refused to talk to police or demanded counsel after receiving Miranda warnings, these statements would have been inadmissible to rebut his insanity defense, since they would have "directly [borne] upon [his] Fifth Amendment [rights]." Id. Because, however, petitioner had not received Miranda warnings and was not under arrest at the time of his remarks, Hunsberger affords him no protection.

> We agree with the U.S. Supreme Court that it is not a "violation of fundamental fairness [under the Fourteenth Amendment] for the State to use a defendant's pre-Miranda silence as impeachment or as substantive evidence of sanity. See Wainwright, supra; Fletcher [v. Weir, 455 U.S. 603, 102 S. Ct. 1309, 71 L.Ed.2d 490 (1982)]; Jenkins [v. Anderson, supra]; Thomas v. State of Ind., 910 F.2d 1413, 1414 (7th Cir. 1990) (admission of pre-Miranda silence and request for counsel as evidence of sanity 'raises no problems'). Prior to a defendant's receipt of Miranda warnings, there is 'no governmental action induc[ing the defendant] to remain silent before arrest.' Jenkins, 447 U.S. at 240, 100 S. Ct. at 2124.

Id., 643 N.W.2d at 371.

Consequently, the Court concludes that evidence of petitioner's pre-arrest communications with police negotiators, including his refusal to discuss the shooting and his multiple requests for counsel, was admissible to rebut his claim of insanity.

B. Counsel acted reasonably in not objecting to evidence of petitioner's pre-arrest remarks.

Trial counsel acted reasonably in declining to object to the evidence of petitioner's pre-arrest communications, since there was no prohibition at the time of trial to evidence of pre-arrest silence. See, e.g., Commonwealth v. Monahan, 378 Pa. Super. 623, 549 A.2d 231 (1988); see also Bolus, supra. At the earliest (if at all), this evidence became inadmissible when the Superior Court issued DiNicola I three years after petitioner's trial.

Commonwealth v. Ervin, 766 A.2d 859 (Pa. Super. 2000), is squarely on point. There, the Superior Court held that defense counsel had a "reasonable basis for failing to object" to evidence of pre-arrest silence, since before DiNicola I "and thus at the time of [the defendant's trial], the state of the law was unclear." Id. at 863. Here, as in Ervin, trial counsel properly declined to object to evidence that was admissible under the law in existence at the time of trial. See also Commonwealth v. Trivigno, 561 Pa. 232, 750 A.2d 243, 253 (2000) (trial counsel is not ineffective for failing to anticipate a change in the law)[24].

C. No prejudice arose from this evidence.

Even if evidence of petitioner's pre-arrest silence was inadmissible, his own witnesses constantly referred to petitioner's insistence on remaining silent about the shooting. N.T. 1338 (Dr. Resnick) (petitioner "actually has never been terribly forthcoming"); N.T. 1352 (Dr. Resnick) ("I don't know why Mr. duPont was not able to tell about the killing"; there are three possible explanations, the third is that he does not recall and elects not to share the information); N.T. 1358 (Dr. Resnick) (on the videotape "he doesn't always answer my questions"); N.T. 1365 (Dr. Sadoff asks petitioner on the tape why he will not answer Dr. Resnick's questions); N.T. 1396 ("we don't have any reason give to us by Mr. duPont"); N.T. 1449 (Dr. Sadoff's remark that Mr. duPont did not acknowledge doing the shooting to me at any time or to anyone"); N.T. 1758 (Dr. Sadoff: "He really told me nothing.

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[24] See also Commonwealth v. Lopez, 559 Pa. 131, 739 A.2d 485, 500 (1999); Commonwealth v. Gibson, 547 Pa. 71, 688 A.2d 1152, 1169 (1997); Commonwealth v. Triplett, 476 Pa. 83, 381 A.2d 877, 881 (1977) ("court must examine counsel's stewardship under the standards as they existed at the time of his action").

He was not forthcoming with his state of mind. He was [in] total denial."); N.T. 1054 (Dr. Carpenter) ("he's not informative to me directly about what was on his mind at that time"). Moreover, the Court properly instructed the jury not to make any improper inferences from evidence of petitioner's demands to speak with counsel stating: " The defendant has an absolute constitutional right to the assistance of counsel, and there are no restrictions regarding the number of times the defendant can meet with his attorney." N.T. 3126-27.

Consequently, any prejudice resulting from references to petitioner's pre-arrest silence and requests to speak with counsel was eradicated by numerous defense references to petitioner's silence about the shooting and the Court's instruction on the proper use of this evidence. Commonwealth v. Simmons, 541 Pa. 211, 662 A.2d 621, 633 (1995) (evidence is not prejudicial where it is cumulative of other evidence elicited by the defense); Commonwealth v. Robinson, 379 Pa. Super. 575, 550 A.2d 800, 803 (1988) (cautionary instruction can cure improper reference to post-arrest silence as consciousness of guilt); Commonwealth v. Gbur, 327 Pa. Super. 18, .474 A.2d 1151, 1155 (1984) (prejudice from reference to post-arrest silence minimized because jury "had previously heard testimony that [defendant] did not remain silent"); see also Commonwealth v. Whitney, 550 Pa. 618, 708 A.2d 471, 478 (1998) ("even an explicit reference to silence is not reversible error when it occurs in a context not likely to suggest to the jury that silence is the equivalent of a tacit admission of guilt").

IV. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SEEK A NEW TRIAL ON THE GROUND OF PROSECUTORIAL MISCONDUCT.

Petitioner insisted that the prosecution engaged in misconduct by injecting the issue of his drug use into the proceedings and by failing to keep its promise to produce Paul McCarthy, an alleged drug dealer, to testify about petitioner's acquisition of cocaine. Petition further faults appellate counsel for failing to raise this issue on direct appeal. This argument is devoid of substance.

According to petitioner, the Court stated incorrectly in its earlier opinion that petitioner was the first party to raise the cocaine issue. Instead, petitioner claims, "the issue of Mr. McCarthy and his relation to petitioner was introduced on cross-examination by the prosecution (N.T. 856-857) and the issue of petitioner's cocaine use was first introduced at trial on cross-examination by the prosecution (N.T. 252-259)." The testimony at pages 856-857 merely established, to use the vernacular, that McCarthy was a "gofer" who ran unspecified errands for the estate. These pages do not contain the slightest hint of drug use by petitioner or drug dealing by McCarthy. Pages 252-257 contain a sidebar conference out of the jury's presence which touched upon the issue of petitioner's drug use. Security consultant Patrick Goodale testified on pages 258-259 that petitioner's demeanor changed in the fall of 1994, but there was no mention of drug use or drug dealing in this testimony. Thus, as discussed above, it was the defense that first referred to petitioner's drug use, not the Commonwealth.

The issue of McCarthy's failure to testify is a red herring. Petitioner argues that (a) one business day before

trial, the Commonwealth published an expert report of John O'Brien, M.D. relating to petitioner's drug use; (b) the Commonwealth promised to lay the foundation for Dr. O'Brien's testimony concerning petitioner's drug use through McCarthy's testimony that petitioner acquired cocaine; and (c) during trial, the Commonwealth repeatedly "promised" that McCarthy would testify, but he never appeared, a "bait and switch" that entitles petitioner to relief. Amended PCRA Petition, pp. 26-27. Petitioner has failed to demonstrate that the Commonwealth intentionally misrepresented that McCarthy would testify. It is at least as likely that McCarthy was a recalcitrant witness who refused to cooperate with the Commonwealth. Assuming arguendo that the Commonwealth lied about McCarthy, the Court has explained above (pp. 16-17) that multiple Commonwealth witnesses provided evidence that petitioner used cocaine. Their testimony was equally as admissible as anything McCarthy might have said and laid a sturdy foundation for Dr. O'Brien's expert testimony. Thus, even if the prosecutors committed misconduct vis-à-vis McCarthy, petitioner suffered no prejudice and is not entitled to any relief.

V. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT CHARACTER WITNESSES.

Petitioner argues that trial counsel was ineffective for failing to present character testimony concerning his reputation in the community for peaceful behavior. The Court rejects this contention.

Evidence of good character offered by a defendant in a criminal prosecution must be limited to his general reputation for the particular trait involved in the commission of the crime charged. Commonwealth v. Lauro, 819 A.2d 100, 109 (Pa. Super. 2003) (citing Commonwealth v. Luther,

317 Pa. Super. 41, 463 A.2d 1073, 1077 (1983)). Such evidence must relate to the time when the offense was committed and must be established by testimony as to the defendant's reputation in the community, not through specific acts or mere rumor. Id.

Here, the traits in question were petitioner's peacefulness and law-abiding behavior. Petitioner, however, fails to list one witness who was willing to testify that he enjoyed a good reputation in the community for these traits as the time he shot Schultz. See Original PCRA Petition, List of Witnesses and Certification of Testimony (listing four witnesses who "knew [petitioner] was a peaceful, law abiding citizen [and] that [he] had a reputation for good acts, philanthropy, honesty, integrity, loyalty and fidelity"). Absent such testimony, petitioner cannot obtain relief[25].

Furthermore, defense counsel had good reason not to present testimony concerning petitioner's reputation in the community for peacefulness. The record contained damaging evidence of petitioner's violent tendencies, including his drug use; his flight from the scene of a hit-and-run automobile accident (N.T. 2062); his tendency to endanger children by driving recklessly (N.T. 2637-2638); his ownership of a machine gun (N.T. 265-271); the fact that he pulled a gun on wrestler Dan Chaid (N.T. 2088, 2099, 2747) and shot bullets into a wall; his use of a powerful

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[25] The Commonwealth observes on page 42 of its memorandum in opposition to the Original PCRA Petition that petitioner failed to list any witness who agreed to testify that he enjoyed a reputation in the community for peacefulness and law abiding behavior. Petitioner failed to correct this omission in his Amended PCRA Petition, fortifying the conclusion that no witness is willing to provide community reputation testimony on these traits.

handgun to kill David Schultz; and the fact that he threw firecrackers at animals (N.T. 1283). Had counsel presented character reputation concerning petitioner's peacefulness, the Commonwealth would have been free to cross-examine the character witnesses with these and other bad acts. Defense counsel acted wisely in avoiding further exploration of these bizarre and criminal misdeeds.

It is true that two years after trial, the Supreme Court held in Commonwealth v. Morgan, 559 Pa. 248, 739 A.2d 1033 (1999), that the Commonwealth cannot cross-examine character witnesses with instances of criminal misconduct not resulting in conviction. Once again, however, defense counsel cannot beheld ineffective for failing to anticipate this change in the law. Ervin, supra, 766 A.2d at 865 & N. 16 (rejecting ineffectiveness claim; counsel acted reasonably in not presenting character witnesses, since law prior to Morgan permitted cross-examination into instances of criminal misconduct for which defendant was never arrested)[26].

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[26] The Court declines to accept certain of the Commonwealth's arguments that cannot be substantiated without evidentiary proceedings, such as (a) the claim that it would have rebutted character testimony with "a parade of witnesses - employees, wrestlers, neighbors, contractors, [petitioner's] former wife, and security personnel - [who testified] that [petitioner] did not have a reputation for peaceful behavior," and (b) the asseveration that the Court "can take judicial notice of the many media accounts of [petitioner's] misdeeds," including a New York Times article one week after the shooting that described many of petitioner's violent episodes. Commonwealth's Response to Original PCRA Petition, pp. 41, 47-48 n. 31. In general, however, the Commonwealth's response is persuasive.

VI. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A MANSLAUGHTER DEFENSE

Petitioner argues that defense counsel should have pursued a manslaughter defense by contending that the shooting was the product of petitioner's sudden, intense anger over the unreasonable amount of money charged by security consultant Patrick Goodale.

The evidence does not support this outlandish thesis. Petitioner himself admits in his Amended PCRA Petition that his "external affect was unremarkable" on the day of the shooting, and that he "seemed to act reasonably even up until he raised his weapon while parked in the Schultz driveway." Amended PCRA Petition, p. 35. Moreover, petitioner's statement to David Schultz, "You've got a problem with me," demonstrates that petitioner held animus toward Schultz, not Goodale. There is no reason to believe that a manslaughter defense would have changed the outcome of trial.

Even if the Court accepted the dubious proposition that the evidence supported a manslaughter defense, the Court has already explained above that the trial counsel had ample basis to present an insanity defense. The fact that trial counsel failed to win an acquittal hardly means that his performance was ineffective. See Commonwealth v. McNeil, 506 Pa. 607, 487 A.2d 802, 808 (1985) ("The course actually chosen by defense counsel, though unsuccessful, had an eminently reasonable basis designed to effectuate his client's interests"); Commonwealth v. Howard, 749 A.2d 951, 955 (Pa. Super. 2000) ("counsel cannot be held ineffective for selecting a particular reasonable course, even if other reasonable choices were available").

Accordingly, petitioner is not entitled to relief on the ground that trial counsel should have raised a manslaughter defense.

VII. PETITIONER'S OBJECTION TO DR. O'BRIEN'S TESTIMONY HAS BEEN PREVIOUSLY LITIGATED AND REJECTED BY THE SUPERIOR COURT

During his direct appeal, petitioner argued that Dr. O'Brien violated the attorney-client and psychiatrist-patient privilege by testifying for the Commonwealth, and that he should not have been permitted to refer to petitioner's prior drug use. The Superior Court rejected both contentions. Commonwealth v. duPont, 720 A.2d 970, 975-77, 980-81 (1999). Petitioner now attempts to raise these same claims cloaked in the guise of ineffective assistance of counsel. As discussed above, however, petitioner "cannot obtain review of claims that were previously litigated by presenting new theories of relief, including allegations of ineffectiveness, to relitigate previously litigated claims." Bond, supra, 819 A.2d at 39.

In an attempt to escape the previous litigation bar, petitioner alleges in a heading (but without further elaboration) that defense counsel was ineffective for failing to request a hearing on the Commonwealth's engagement of Dr. O'Brien and for failing to obtain copies of Dr. O'Brien's or Dr. Dietz's consultations notes. Since petitioner fails to explain these claims or demonstrate any prejudice, the Court rejects these arguments as meritless.

VIII. PETITIONER'S SECOND CLAIM OF PROSECUTORIAL MISCONDUCT FAILS

Petitioner's next claim consists of a hodgepodge of meritless prosecutorial misconduct arguments.

First, petitioner alleges misconduct with regard to the testimony of Robert Calabrese, rehashing the same argument addressed on pages 12-20, supra. For the same reasons provided above, the Court rejects this contention.

Second, petitioner claims misconduct arising from the Commonwealth's alleged use pf a report prepared by Dr. Sudak after Drs. Sudak and O'Brien met with petitioner's attorney. There is no evidence that the Commonwealth used the Sudak report to gain information about petitioner's drug use. In fact, the Commonwealth obtained information about petitioner's drug use from various individuals who had contact with petitioner over the years. N.T. 2435 (Dr. O'Brien's testimony that he interviewed persons who related circumstantial evidence of petitioner's longstanding substance abuse).

Third, petitioner complains that Dr. O'Brien referred to Paul McCarthy during his testimony. The Court has already rejected this argument on page 35, supra.

Fourth, petitioner complains that the prosecution presented Dr. O'Brien as a witness and used him to introduce evidence of petitioner's drug use. As explained above, this claim was litigated during petitioner's direct appeal and cannot be revisited during PCRA proceedings.

Lastly, as the Commonwealth correctly observes, none of these matters involve the type of "egregious, extensive and flagrant prosecutorial misconduct" that warrant relief under the PCRA. Commonwealth v. Daidone, 453 Pa. Super. 550, 684 A.2d 197, 180 (1997).

IX. PETITIONER IS NOT ENTITLED TO RESENTENCING ON THE BASIS OF NEWLY DISCOVERED EVIDENCE

Petitioner argues that he is entitled to resentencing on the basis of newly discovered evidence that prescription medication, not insanity, was the reason for his behavior on the day of the shooting. The "central assumption" at sentencing, petitioner states, was that he suffered from incurable paranoid schizophrenia which "rendered him 'exceptionally dangerous' and warranted . . . a lengthy sentence," Amended PCRA Petition, p. 51 (citing Sentencing Transcript, p. 303). This assumption in "materially untrue," since Dr. Sadoff has concluded that petitioner killed Schultz due to ingestion of Scopolamine and "does not suffer from a deeply ensconced mental illness." Id., pp. 51, 52. Moreover, petitioner "had no reasonable means or opportunity" to alert the Court to this "material untruth" at the time of sentencing. Id., p. 52. Because his sentence "rest upon mistaken and inaccurate factual assumptions, [it] violates due process" and must be vacated. Id.

These allegations do not entitle petitioner to resentencing, since there is no reason why petitioner failed to present this theory at the time of the sentencing, and since it would not have affected the terms of his sentence.

Preliminarily, the Court finds that petitioner's due process challenge to his sentencing hearing in cognizable under 42 Pa.C.S. § 9543(a)(1), which permits a PCRA petitioner to claim "violation[s] of the Constitution of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." Cf. Commonwealth v. Chester, 557 Pa. 358, 733 A.2d 1242, 1248-49 (1999) (§ 9543(a)(1) permits review of claims arising in penalty phase of capital case; penalty phase is truth-determining process, since it involves presentation of evidence, determination of facts, and adjudication setting forth specific findings, and concept of "guilt or innocence"

encompasses more than just conviction for underlying criminal offense)[27].

Although this claim is cognizable under § 9543(a)(1), it has been waived under 42 Pa.C.S. § 9543(a)(3) due to petitioner's failure to raise it at sentencing. During the 15 months between the shooting and petitioner's sentencing, the defense could easily have discovered his use of scopolamine by questioning him, his staff and his treating physician, or by searching his residence[28]. Alternatively, petitioner himself should have revealed this information to his attorneys, "given the incredibly exhaustive medical testing and evaluations to which he was subjected by his defense team after the murder . . ." Commonwealth's Response to Original PCRA Petition, p.20. As the Commonwealth further observes:

> Having declined to inform any of his more than one dozen attorneys, or his many physicians, about his illnesses, treatment or medication, [petitioner] cannot now craft a[n entirely] new defense to replace the defense that failed at trial [and sentencing]. Defendants are not entitled to withhold

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[27] Moreover, a claim of sentencing error based on misinformation is a due process issue that traditionally has been cognizable on habeas corpus review. Commonwealth ex rel. Elliot v. Baldi, 96 A.2d. 122 (1953). Claims which are traditionally cognizable on habeas corpus review remain cognizable under the PCRA. Commonwealth v. Lantzy, 736 A.2d 564 (Pa. 1999); Commonwealth v. Gigliardi, 758 A.2d 193 (Pa. Super. 2000).

[28] Although petitioner accuses his attorneys of ineffectiveness for failure to raise a scopolamine defense during trial, he does not claim they were ineffective for failing to raise this issue at sentencing, electing instead to call the evidence of scopolamine "newly discovered."

> information from their attorneys and physicians and then use it to obtain a new trial after they have been convicted and all of their direct appeals have been denied.

Id. Petitioner simply has no excuse for waiting until the PCRA stage before injecting the issue of scopolamine into this case.

Even if petitioner did not waive this argument, it would not have resulted in a reduction of sentence. Contrary to petitioner's argument, his need for mental health treatment was not the "central assumption" at sentencing. Instead, the "central assumption" mandated by the verdict was that petitioner committed a terrible crime for which he deserved a lengthy period of incarceration. Although the Court considered the fact that petitioner was mentally ill and needed treatment, the specific cause of his mental illness was not material to the Court's sentencing determination. Having been found guilty but mentally ill of third degree murder, petitioner would have received the same sentence regardless of whether he suffered from mental illness or from the side effects of scopolamine (or both) at the time of the offense[29].

X. PETITIONER IS NOT ENTITLED TO DISCOVERY.

Petitioner contends that "the allegations set forth in the [Amended PCRA Petition constitute] exceptional circumstances" which entitle him to discovery of the

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[29] Given the, multitude of experts who agreed that petitioner was mentally ill, including the court's own appointed expert, it is far more likely that petitioner suffered from mental illness that fell short of insanity instead of the side effects of scopolamine.

consultation notes of Drs. Dietz and O'Brien and other materials from the District Attorney's files. The Court disagrees. During post-conviction review, "no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of exceptional circumstances." Pa.R.Crim.P 902. No exceptional circumstances exist herein, because petitioner's claims are facially devoid of merit.

XI. CONCLUSION

Because petitioner failed to state claims which warrant PCRA relief, no need exists for an evidentiary hearing. Commonwealth v. Pirela, 556 Pa. 32, 726 A.2d 1026, 1037 (1999) ("where the record reflects that the underlying claim is of no arguable merit or no prejudice resulted, no evidentiary hearing on an ineffectiveness claim is required"). Accordingly, the Court will deny petitioner's amended petition for post-conviction relief. An appropriate order will be entered simultaneously herewith.

BY THE COURT

_/s/_____
PATRICIA H. JENKINS, J. [9/22/03]